SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 912

CONTRACTORS CARGO CO., *Appellant.*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
DEALERS TRANSIT, INC.,
PROGRESSIVE TRANSPORTATION CO.,

and

J. H. ROSE TRUCK LINE, INC., *Appellees.*

Appeal From the United States District Court for the Central District of California

JURISDICTIONAL STATEMENT

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No.

CONTRACTORS CARGO CO., *Appellant.*

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and
J. H. ROSE TRUCK LINE, INC., *Appellees.*

Appeal From the United States District Court for the Central District of California

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JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of the United States District Court for the Central District of California entered on July 8, 1969, dismissing appellant's complaint which sought to enjoin an order of the Interstate Commerce Commission. This statement is sub-

mitted to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the statutory three-judge court from which this appeal is taken is reported at 299 F.Supp. 287, and is attached hereto as Appendix A, pages 1a to 7a. The findings of fact and conclusions of law of that court are attached hereto as Appendix B, pages 7a to 13a, and its judgment is reproduced as Appendix C, page 14a.

The opinion of Division 1 of the Interstate Commerce Commission which cast and discusses the issue involved in this appeal is reported at 96 M.C.C. 306 and is attached as Appendix D, pages 15a to 37a. The Opinion of the Interstate Commerce Commission On Reconsideration, which adopted the conclusions of the Division 1 opinion and was affirmed by the decision being appealed, is reported at 105 M.C.C. 683 and is contained herein as Appendix E, pages 37a to 88a.

JURISDICTION

This action was commenced pursuant to 28 U.S.C. 1336, 1398, 2284, and 2321-2325 (Appendix F, pp. 89a-92a), to set aside cease and desist orders of the Interstate Commerce Commission issued in proceedings styled Docket Nos. MC-C-3607, *Asbury Transportation Company, Et Al.* v. *Contractors Cargo Company* and MC-C-3628, *Contractors Cargo Company, Investigation and Revocation of Permit.* The judgment of the District Court (Appendix C, p. 14a) was filed on July 3, 1963 and entered on July 8, 1969, and notice of appeal

was filed in that court on August 6, 1969. Jurisdiction of the Supreme Court to review the judgment of the three-judge statutory court on direct appeal is conferred by 28 U.S.C. 1253 (Appendix 6, p. 93a). The following decisions sustain the jurisdiction of this Court to review the decision in this case: *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409, 88 S.Ct. 539, 19 L.ed. 2d 639 (1967); *Penn-Central Merger and N. & W. Inclusion Cases*, 389 U.S. 486, 19 L.ed. 2d 723, 88 S.Ct. 602 (1968); *Alton R. Co.* v. *United States*, 287 U.S. 229, 77 L.ed. 275, 53 S.Ct. 124 (1932).

QUESTIONS PRESENTED

1. May the threshold question of ambiguity in the terms of a permit be resolved on the basis of the drafter's intent rather than on the meaning of the language actually employed in phrasing the grant?

2. Must the interpretative actions of the Commission achieve a minimum of consistency which, in distinguishing between radial and non-radial territorial descriptions, bars abandonment of the usual and exclusive interpretative test where the result is a diminution of operating rights?

3. Was the court below justified in advancing its own independent finding that the permit contained a glaring error or inconsistency which should have put a purchaser on guard where the Commission has disavowed any inadvertence or mistake?

STATUTES INVOLVED

Sections 204(2), 205(g), 209(b) and 212(a) of the Interstate Commerce Act, as amended, (49 U.S.C. 304 (2), 305(g), 309(b) and 312(a)).

STATEMENT OF THE CASE

Appellant is a California corporation which was authorized by the Interstate Commerce Commission on October 6, 1960, to purchase a motor carrier permit for $90,000. The permit authorized contract carrier service on construction materials and contractors' machinery, supplies and equipment, so far as herein pertinent, between railheads in California, Arizona, New Mexico, Oregon, Washington and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.[1] Appellant was three steps removed from the original holder, having obtained the permit from one William A. Hufnagel, who had purchased it from Constructors Transport Company which had acquired it from Ellsworth Pexton to whom the permit was originally issued in 1939.

Based on service conducted and held out by its immediate predecessor and on its own understanding of the language, appellant thereafter regarded its permit as non-radial authority to operate between any two railheads in the states of California, Arizona, New Mexico, Oregon, Washington, and Nevada; between any two construction projects or other points of use in the six named states which are located within 100 miles of any railhead in these states; and between railheads in any of the six named states and any construction projects or other point of use located in said states within 100 miles of such railheads, or, where there is

[1] Throughout the proceeding the territorial description before the semi-colon is referred to as the "first paragraph."

no railhead located within 100 miles of a particular construction project or point of use, between such project or point of use and the nearest railhead. On March 2, 1962, because of competitive pressures, appellant sought clarification of its permit, and suitable additional authority in the event the Commission disagreed with its interpretation of the existing permit. Shortly thereafter, appellee Progressive Transportation Co., and other carriers filed a complaint with the Commission alleging that appellant was exceeding the territorial scope of its permit and the Commission also instituted its own investigation. The three proceedings were heard on consolidated record made during nine days of hearing ending on July 15, 1963. Appellee carriers were parties to each proceeding.

At the 1963 hearing, before any determination of ambiguity and over appellant's objection (Hearing Transcript pp. 1104, 1113), there was received in evidence an exhibit consisting of the transcript of the 1938 hearing in the proceeding in which appellant's predecessor, thrice removed, was initially issued the involved permit. The examiner recommended a denial of the application, discontinuance of the complaint and investigation proceedings and replacement of the existing permit with a new permit correcting what he found to be inadvertent clerical or ministerial errors.[2] He held that Section 212 of the Interstate Commerce Act, which makes the issuance of a certificate the final step in the administrative process, would bar correction of an inadvertent error only if the purpose is to execute asubsequently adopted policy. He concluded that the permit failed to coincide with the findings and inten-

[2] The examiner's report and the hearing transcript are parts of the certified record.

tions of the Commission in the 1939 proceeding in which the permit was originally issued, and that allegations of unlawful operations should be mooted by the issuance of a new permit.

Exceptions were filed to the recommended report. Thereafter, in a decision reported at 96 M.C.C. 306 (Appendix D), the Commission, Division 1, differed with the Examiner on the resolution of the complaint and investigation proceedings. It acknowledged as the cardinal rule that unambiguous operating rights must be construed according to their terms "regardless of what may have been intended at the time of their issuance" and "regardless of whether the practical result is to confer upon the carrier more or less authority than may have been intended to be granted originally." It then identified the interpretative problems to be resolved here as whether the first paragraph of appellant's permit *contemplates* a radial grant or the Commission in issuing the permit *intended* a non-radial grant and whether a radial grant was *intended* in the second paragraph. Thereupon, it stated that the absence from appellant's permit of certain words of extremity ordinarily would indicate that "an authorization of unlimited non-radial operations between all of the described points was *intended,*" but concluded that the language ". . . is not sufficiently clear and concise to indicate conclusively that a non-radial grant was *intended.*"

After rejecting the significance of the absence of the words of extremity, the Division found the permit patently ambiguous because the repetition of the states in the first paragraph of the permit suggests that a dual radial grouping of service points "was *intended* rather than a single non-radial group"; if "a non-

radial operation was *intended*", it could have been more simply stated; the second paragraph "clearly implies that only radial operations were authorized," as it is connected with and dependant upon the first paragraph; from the foregoing the Commission is unable to conclude whether the first paragraph authorized radial or non-radial service; and the language in other respects is contradictory and unclear (Appendix D, page 22a). The Division then examined the record in the original 1938 proceeding and concluded that the pertinent parts of the permit

> ". . . contemplate radial operations between railheads, *on the one hand, and on the other*, construction projects or other points of use; that the 100 mile radius in the first paragraph must be drawn from the 'railhead' actually used by applicant in serving a particular construction project or point of use; and that no service is authorized in the second paragraph to or from railheads or other points of use outside the six states named in the first paragraph." (Appendix D, page 23a) (Emphasis supplied)

Thereafter, the proceedings were reopened for reconsideration by the entire Commission on its own motion and a decision was issued affirming, without further discussion, the Division 1 findings with respect to the territorial scope of the permit.[3] Appellant filed the instant suit in the court below on November 14, 1967. The court at 299 F.Supp. 291 states the threshold question to be:

> ". . . whether the certificate (sic) is indeed ambiguous on its face. The certificate (sic) speaks

[3] The decision of the entire Commission deals almost exclusively with appellant's status as a common or contract carrier, an issue which is not involved here.

> for itself, unless it is patently indefinite or ambiguous. Absent such ambiguity, extraneous matters may not be referred to in order to interpret the permit, particularly when it is held by an innocent purchaser. *McCormack Trucking Company v. United States, supra.*"

The court found that the words which the Commission ordinarily used to indicate a grant of radial authority do not appear to be a touchstone by whose presence or absence the permit must be construed and that, because this permit may be construed as either non-radial or radial authority, the Commission properly resorted to the record to aid in its construction (299 F.Supp. at 291). The court also found that appellant does not merit special consideration as a good faith purchaser where the language of the permit presents such a glaring error or inconsistency that he (sic) should be put on guard (Appendix A, page 7a). From that decision this appeal is taken.[4]

SUBSTANTIAL QUESTIONS EXIST

This appeal involves an issue of greater magnitude than whether the territorial authority of a particular motor carrier is radial or non-radial in character. It questions the power of an issuing agency, through an interpretative rewriting of a motor carrier permit, to partially revoke operating rights which the holder purchased for value and exercised for several years in reliance upon long-standing interpretative policies. At issue is the validity of grounding a patent ambiguity finding on what the agency now believes was intended

[4] Justice Douglas, by order dated September 12, 1969, has stayed the cease and desist order of the Interstate Commerce Commission pending perfection and disposition of this appeal. The stay order is reproduced herein as Appendix H, p. 93a.

at the time of issuance to appellant's predecessor, thrice removed, rather than on the meaning traditionally accorded to the terms of the involved permit.

Appellant acquired its permit over twenty years after the Commission first established a policy of employing certain words to designate radial territorial authority and long after many agency and court decisions on the issue. Traditionally the Commission has employed, and continues to employ, the words of extremity "on the one hand" and "on the other hand" to delineate radial type services which must begin or end at a base point or area. These words of extremity have been exclusive and, from the standpoint of constructing radial authority, their use has been mandatory. No grant of radial-type authority has been made which has not included the described words of extremity. It generally has been understood that a grant of radial authority may not be achieved by employing other and fewer apt words.

While not refuting this proposition, the instant interpretation of appellant's permit represents the first attempt by the Commission to avoid the implications of its own long-standing policy. Such maneuver is accomplished by steering clear of the meaning of the language of the involved permit and dwelling on the drafter's intention. Acknowledging that appellant's permit is devoid of the above-described words of extremity, the Commission stated (Appendix D, page 21a) that "ordinarily the absence of such phrase would indicate an authorization of unlimited non-radial operations between all of the described points was intended." Thereupon, the Commission commenced to question the intent because of a belief that the wording could have been more simply stated. This finding was

made despite the fact that the very authority was before the Commission in five previous proceedings, and on none of these occasions was any need expressed by the agency for clarifying or reforming the wording of the permit. By considering the intent, rather than the meaning, it avoided having to resolve any genuine doubt against the drafter.

The lower court's affirmance is irreconcilable with the admonitions in *T. I. McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526, that the Commission must allow the award to speak for itself or must adequately explain its resort to antecedent matters. There the Commission was told that it may not wait until disputed language was found ambiguous and the prior record had been admitted before considering its usual rule of construction. On the contrary, that court held the Commission's own well-founded procedures precluded the underlying record from initial consideration and made the ordinary rule of construction a factor to be fully considered in deciding whether a patent ambiguity existed. It enunciated the rule that the minimum requirements of consistency bar an agency from disregarding or changing well established procedures and from using a faulty finding of ambiguity to resort to antecedent matters whenever it sees fit. There is no material difference between the principle in the two proceedings. As in the *McCormack* case, after reciting the correct governing principles, the Commission here ignored its own bench mark that patent ambiguity is a threshold finding. It inquired into the intent at the time of issuance and the underlying record for the dual purpose of establishing ambiguity and of excusing it from giving effect to long recognized rules of construction.

The court below emphasizes the agency's role as the interpreter of its awards and the inviolability of an interpretation if it is not completely unreasonable and is based on evidence of record. Quite apart from its rational basis, an interpretation may not be a prejudicial departure from the requirements of law, else it becomes an abuse of discretion in excess of statutory authority. Modifying appellant's permit to include words of extremity associated with radial service does not satisfy these tests where the agency refused to find that the unrestricted permit was issued as a result of inadvertence or mistake and relies on the drafter's intent to determine ambiguity. Disagreement between the parties is not conclusive proof of ambiguity. Nor does the reasonableness which the lower court sees in the Commission's present interpretation cure the fact that ambiguity was determined, not from the face of permit, but from what the Commission now believes was intended at the time of issuance. By the expedient of introducing a new construction of appellant's permit, the Commission created a difference of opinion calculated to result in an ambiguity. Resort was not only made to extraneous matters but the words connoting radial operations were retroactively grafted upon the permit. This had the prejudicial effect of precluding future service by applicant between any two railheads in the six-state area and between any two projects or points of use within 100 miles of a railhead. No genuine basis exists for judicial self-restraint. The Commission did not find the language in question to be technical in any respect and did not invoke its expertise in interpreting this language. While courts may give wide latitude to Commission interpretations of commodity descriptions, the same is not true where non-

technical territorial descriptions are in issue. It was so held on a second remand in *T. I. McCormack* v. *United States*, 298 F.Supp. 39 (1969).

The Commission acquiesced in the latest *McCormack* decision only on an *ad hoc* basis.[5] Judicial sanction of the Commission's action in the instant case would leave the law in an unsettled state. It will create a precedent with industry-wide impact far beyond the apparent realization of the court below. The lower court's opinion will be relied upon for the proposition that the *usual* test in interpreting radial territorial authority is not a *necessary* test even where the use of a different test will result in narrower operating rights. This holding undoubtedly will be read into the court's findings that although commonly used to designate radial authority, the presence or absence of the words "between * * * on the one hand, and, on the other * * *" is not a touchstone by which the territorial scope of authority must be construed (Appendix A, page 6a). Yet, these words may be read into grants, as was done here. Existing authority of appellant and numerous other carriers will become subject to a more restrictive interpretation than has traditionally been the case. This is at odds with the holding in *McCormack* that in order to afford the certainty and continuity essential for both carriers and the shipping public in such an extensively regulated industry, reliance on the language of an operating certificate must not go unrequited.

---

[5] Subsequent to the filing of the notice of appeal in the instant case, the Commission had its notice of appeal in the second *McCormack* case dismissed and, in a decision reported at 110 M.C.C. 499, reversed its prior report with the caveat that such holding was applicable solely to the facts and circumstances in the particular proceeding.

Appellant was not a party to the 1938 proceeding in which the original permit was issued. The purchase was made by appellant in reliance upon a legal opinion that such authority was non-radial and assurance that its immediate predecessor provided service consistent with such opinion. The record shows that appellant paid $90,000 for the permit which its predecessor had acquired for $6,000 and that appellant's president had no doubt at the time of such acquisition as to the proper scope of operation permitted thereunder. Even if the permit which it relied upon in good faith were deemed to be ambiguously worded, appellant urged below that its interpretation should prevail because the loss of over 80 percent of its interstate revenues would destroy its business. This position reflected the holding in *McCormack* that an innocent purchaser status should be afforded even fuller protection under the Commission's established procedures than may be afforded a participant in the original proceeding. It is important to note that, rather than agree with the examiner that there had been an actual grant of more authority than was intended, the Commission made no finding of any inadvertent omissions or inclusions. Instead, it declared the language ambiguous on the basis of the drafter's intent and initiated a new interpretative policy. It is highly improbable that where the Commission disavowed the hearing officer's findings of inadvertence in the language of the permit, the lower court may on its own initiative discredit the innocent purchaser status of appellant by advancing a finding of "glaring error" sufficient to put a good faith purchaser on guard.

CONCLUSION

We believe that the questions presented by this appeal are substantial, and are of such public importance as to require plenary consideration, with briefs and oral argument, particularly in view of the split of authority which now exists in the lower courts that have previously considered the issues presented herein.

Respectfully submitted,

CONTRACTORS CARGO CO.

By .....
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Certificate of Service

I, William P. Sullivan, one of the attorneys for appellant Contractor Cargo Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 4th day of December, 1969, I have served copies of this Jurisdictional Statement on attorneys of record of each of the parties hereto as follows:

By first class mail, in duly addressed envelopes, with first class postage prepaid, to the following:

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WILLIAM P. SULLIVAN

APPENDIX

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 67-1655-TC

CONTRACTORS CARGO COMPANY, a corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSON, *Defendants*.

Before: BARNES, Circuit Judge; CLARKE, Chief District Judge; and GRAY, District Judge.

CLARKE, Chief District Judge:

Plaintiff, a contract carrier of construction equipment and material, seeks to enjoin enforcement of, and to set aside, an order of defendant Interstate Commerce Commission requiring plaintiff to cease and desist from conducting certain operations.

Alternatively, plaintiff asks the court to permit it to continue present operations pending the filing and determination by the Commission of an application for common carrier authority.

Three other carriers, parties to the proceeding before the Interstate Commerce Commission, have intervened as parties defendant.

Plaintiff is a California corporation conducting business in the states of California, Arizona, Nevada, New Mexico, Oregon, and Washington. It operates under a per-

mit issued by the Interstate Commerce Commission, which permit authorizes transportation over irregular routes of

> "Construction materials and contractors' machinery, supplies and equipment,
>
> "(1) From Los Angeles, Calif., Harbor points to sites of construction projects in California within 250 miles thereof, with no transportation for compensation on return except as otherwise authorized;
>
> "(2) Between railheads in Calfornia, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof."

At issue is the question whether the permit is a grant of radial or nonradial authority. (In radial service, the carrier is limited to shipments moving from or to a designated base point. In nonradial service, the carrier may operate within a described territory without reference to a base point.)

The permit was issued initially to Ellsworth Pexton of Los Angeles, doing business as Santa Fe Truck Company. Pexton transferred the permit to Constructors Transport Co., and the latter transferred it to William A. Hufnagel, doing business as Contractors Cargo Company. Plaintiff corporation acquired the permit by assignment from Hufnagel.

By various transfers of corporate stock during 1962 and 1963, Clark & Wheeler Engineering Co., Inc., acquired all stock of plaintiff corporation.

By application filed with the Commission March 2, 1962, plaintiff sought clarification of its permit and additional

authorization to operate as a contract carrier by motor vehicle, over irregular routes, of construction materials and contractors' machinery, supplies and equipment, between points within a radius of 100 miles of all railheads in the six states and construction projects or other points of use within a radius of 100 miles of such railheads.

Plaintiff describes its application for extension of operating authority as a "safeguard" filed only to protect the carrier in the event the Commission disagreed with plaintiff's interpretation of its existing permit.

A number of other carriers filed a complaint with the Commission alleging plaintiff was conducting operations beyond the scope of its authority. The Commission also instituted its own investigation. The complaint proceeding, the investigation, and plaintiff's application for clarification were consolidated, and the matter was referred to a hearing examiner.

Following a hearing, the examiner issued a recommendation and order finding the permit "contains provisions reflecting error or inadvertence, in that such permit fails to coincide with the findings and intention of the Commission." He recommended that the existing permit be canceled and a new one issued.

The parties filed exceptions and replies to the examiner's report. Thereafter, the Commission, Division 1, issued its decision holding in part:

> "After carefully reviewing these pertinent parts of applicant's permit, we are unable to conclude whether radial or nonradial operations were authorized in the first paragraph quoted above, and in other respects we find the language employed in the above-quoted passages to be contradictory and unclear. Consequently, we conclude that applicant's permit is patently indefinite and ambiguous and that the record in the proceedings underlying applicant's permit must be examined in order to aid in its interpretation."

That record [Pexton Extension of Operations—Coast States, 13 M.C.C. 369 (1939)] shows the authorization sought was "between railheads in the States of California, Arizona, New Mexico, Oregon, Washington, and Nevada, an the one hand, and sites of adjacent construction projects in the same States, on the other."

In proceedings preliminary to issuance of the Pexton permit, the examiner stated:

> "* * * The predominant movement is, of course, from railhead to construction sites. There is, however, a small return movement of excess materials and used equipment, machinery, and supplies. Operation in either direction between railheads and construction projects will be authorized."

The Division concluded, in part:

> "It is clear, therefore, that both the first and second paragraphs of the pertinent parts of applicant's permit contemplate radial operations between railheads, on the one hand, and, on the other, construction projects or other points of use; that the 100-mile radius in the first paragraph must be drawn from the 'railhead' actually used by applicant in serving a particular construction project or point of use * * *."

The decision subsequently was affirmed by the full Commission.

The Commission issued a cease and desist order September 1, 1967, barring plaintiff "from exceeding the territorial scope of its permit." The order was to have become effective November 16, 1967.

This Court issued a temporary restraining order November 14, 1967, restraining the Commission from enforcing its order.

Plaintiff seeks review only of the Commission's determination of the territorial scope of its permit as being

radial rather than nonradial, and of the cease and desist order.

Plaintiff argues that the Commission failed to apply proper principles governing interpretation of the permit, ignored the rules applicable to delineation of radial and nonradial operating authority, erred in finding the permit patently ambiguous, erred in referring to extraneous matters for the purpose of construing the permit, and failed to consider plaintiff's status as an innocent purchaser.

An affidavit of Gerald J. Wheeler, vice president of plaintiff corporation, states that officers, directors and shareholders of Clark & Wheeler acquired the stock under the belief plaintiff's permit authorized it to engage in nonradial operations, and the business has been conducted in accordance with such understanding. At the time this proceeding was commenced, nonradial operations accounted for approximately 85 per cent of plaintiff's revenue from interstate operations. Various contracts then in force provided for the carrier to render nonradial service.

Construction of the extent of transportation authorized by a certificate or a permit is for the Commission. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959). The Court will not set aside nor modify such orders if they are within the compass of the Commission's statutory authority, are not completely unreasonable, and are based on adequate findings supported by substantial evidence from the record. *McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526 (D.N.J. 1966); *Malone Freight Lines* v. *United States*, 107 F.Supp. 946 (N.D. Ala. 1952), *aff'd.* 344 U.S. 925 (1953).

The threshold question is whether the certificate is indeed ambiguous on its face. The certificate speaks for itself, unless it be patently indefinite or ambiguous. Absent such ambiguity, extraneous matters may not be referred to in order to interpret the permit, particularly when it is held by an innocent purchaser. *McCormack Trucking Company* v. *United States*, *supra*.

Plaintiff accords great significance to absence from the permit of the words "between * * * on the one hand, and, on the other * * *" which commonly are used to designate radial authority (*National Moving & Warehouse Corp.* v. *I.C.C.*, 48 F. Supp. 284, 285 (S.D.N.Y. 1942). The Commission also notes the lack of these words would ordinarily indicate a grant of authority to conduct unlimited nonradial operations between all the described points; but it found the language of the permit not sufficiently clear and concise as to indicate conclusively that a nonradial grant was intended.

No case has been cited, either to this Court or in the course of the Commission proceedings, wherein radial authority has been granted without use of the words above quoted. Neither does it appear that the phrase is a touchstone by whose presence or absence the permit must be construed.

Plaintiff interprets the second paragraph of its permit to authorize nonradial operation between any two railroads in the six states, between any two construction projects or other points of use in those states within 100 miles of any railhead in the six states, and between a railhead in any of the named states and a construction project or other point of use in the states within 100 miles of a railhead, or, where there is no railhead within 100 miles of a particular construction project or point of use, between the project or point of use and the nearest railhead.

The permit likewise may be construed, without violence to the language, as allowing radial service between railhead and construction project or other point of use within the circumscribed area.

The Court finds the certificate is ambiguous, and the Commission properly resorted to the record to aid in its construction. The Court further finds the Commission's order is within its statutory authority, is reasonable, and is based on adequate findings supported by substantial evidence in the record.

Plaintiff urges that as a good faith purchaser it is entitled to rely on its original interpretation of the language of the permit. A good faith purchaser does not merit special consideration where the language of the permit presents such a glaring error or inconsistency that he should be put on guard. *McCormack Trucking Company* v. *United States, supra.*

The temporary restraining order will be vacated, and judgment granted for defendants. Counsel for defendants are directed to prepare findings of fact and conclusions of law and judgment in conformity herewith.

DATED this 9th day of May, 1969.

STANLEY N. BARNES
Circuit Judge

THURMOND CLARKE
Chief District Judge

WILLIAM P. GRAY
District Judge

APPENDIX B

Filed July 3, 1969

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 67-1655-TC

Findings of Fact and Conclusions of Law

This action having come on for final hearing at Los Angeles, California, on April 16, 1969, before the undersigned Judges, sitting as a three-judge district court duly constituted pursuant to 28 U.S.C. 2284 and 2321-2325, and the Court having considered the pleadings herein filed, the evidence consisting of the record made before the Interstate Commerce Commission as well as the reports and orders of the Commission herein introduced, and the briefs and oral arguments of counsel for the several par-

ties, and having entered its opinion on May 9, 1969, now makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This action seeks to enjoin enforcement of, and to set aside an order of the Interstate Commerce Commission in Dockets Nos. MC-C-3607 and MC-C-3628, requiring plaintiff to cease and desist from exceeding the territorial scope of its contract carrier permit in the manner found to be unlawful. In the alternative plaintiff asks the Court to permit it to continue the operations which are the subject of the Commission's cease and desist order pending the filing and determination by the Commission of an application for common carrier authority.

2. The cease and desist order was issued in a consolidated proceeding entitled *Contractors Cargo Company—Extension of Operations*, No. MC-17745 (Sub-No. 5); *Asbury Transportation Company, et al. v. Contractors Cargo Company*, No. MC-C-3607; *Contractors Cargo Company, Investigation and Revocation of Permit*, No. MC-C-3628, 96 M.C.C. 306 (October 22, 1964); 105 M.C.C. 683 (September 1, 1967). The plaintiff attacks the Commission order, however, only insofar as its determines the territorial scope of plaintiff's permit as authorizing a radial rather than a nonradial operation and requires plaintiff to cease such nonradial operations. In radial service, the carrier is limited to shipments moving from or to a designated base point. In nonradial service, the carrier may operate within a described territory without reference to a base point.

3. Plaintiff is a California corporation with its principal office located in the Central District of California and conducts business in the States of Arizona, California, New Mexico, Nevada, Oregon and Washington as a contract motor carrier under a permit issued by the Interstate Commerce Commission. As pertinent here, plaintiff's permit

authorizes motor contract carriage over irregular routes of construction materials and contractor's machinery, supplies, and equipment, as follows:

(1) Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or

(2) Between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.

4. Plaintiff contended before the Commission that the authority in paragraph (1) is nonradial as established by the absence of certain words commonly found in radial types of authority, namely, the words "between . . . on the one hand, and, on the other . . . ." While recognizing that the lack of these words would normally indicate a grant of nonradial authority, the Commission held that the language of this permit was ambiguous and that, therefore, in order to ascertain the territorial scope of the permit it could look at antecedent material, namely, the record in the proceeding in which the authority was originally granted to a predecessor of plaintiff.

5. The permit was issued initially to Ellsworth Pexton in Docket No. MC-17745 (Sub-No. 1), 13 M.C.C. 369 (January 6, 1939). Pexton transferred the permit to Constructors Transport Co., and the latter transferred it to William A. Hufnagel, doing business as Contractors' Cargo Company. Plaintiff corporation acquired the permit by assignment from Hufnagel. By various transfers of corporate stock in 1962 and 1963, Clark & Wheeler Engineering Co., Inc., acquired all stock of plaintiff corporation.

6. By application filed March 2, 1962, plaintiff sought clarification of its permit, and, in the alternative, in case the Commission did not accept plaintiff's interpretation of its permit, an extension of its authority to operate

as a contract carrier by motor vehicle, over irregular routes, of construction materials and contractors' machinery, supplies, and equipment, between points within a radius of 100 miles of all railheads in the six states and construction projects or other points of use within a radius of 100 miles of such railheads. Subsequently, a number of motor carriers filed a complaint with the Commission charging that plaintiff had been exceeding the scope of its authority. The Commission also instituted an investigation on its own initiative of plaintiff's operations. The three proceedings were referred to an examiner to be heard on a common record.

7. Following a hearing the examiner recommended that plaintiff's permit be cancelled and a new one issued finding that the permit "contains provisions reflecting error or inadvertence, in that such permit fails to coincide with the findings and intentions of the Commission."

8. Following exceptions and replies to the Examiner's Report, the Commission, Division 1, found that it was unable to determine from the permit whether radial or non-radial operations were authorized in the first paragraph as set forth above, that the language of the permit was contradictory and unclear, that plaintiff's permit was patently indefinite and ambiguous, and that the record in the proceeding underlying applicant's permit [*Texas Extension of Operations—Coast States*, 13 M.C.C. 309] had to be examined in order to aid in its interpretation.

9. The Commission found that the record in the Texton proceedings showed that the authorization sought was "between railheads in the States of California, Arizona, New Mexico, Oregon, Washington and Nevada, on the one hand, and sites of adjacent construction projects in the same States, on the other." In the Texton proceedings the examiner had found that "... the predominant movement is, of course, from railhead to construction sites. There is, however, a small return movement of excess materials and used equipment, machinery, and supplies

Operation in either direction between railheads and construction projects will be authorized."

10. The Commission, Division 1, concluded, 96 M.C.C. at p. 312:

> It is clear, therefore, that both the first and second paragraphs of the pertinent parts of applicant's permit contemplate radial operations between railheads, on the one hand, and, on the other, construction projects or other points of use; that the 100-mile radius in the first paragraph must be drawn from the "railhead" actually used by applicant in serving a particular construction project or point of use; and that no service is authorized in the second paragraph to or from railheads or other points of use outside the six States named in the first paragraph.

11. The decision of the Division was affirmed by the full Commission (105 M.C.C. 683). The Commission issued a cease and desist order on September 1, 1967, effective November 16, 1967, barring plaintiff "from exceeding the territorial scope of its permit." This Court, on November 14, 1967, issued a temporary restraining order, preventing the Commission from enforcing its order.

12. Plaintiff seeks a review only of the Commission's determination of the territorial scope of paragraph (1) of its permit as set forth in Finding 8 above as being radial rather than nonradial, and that the cease and desist order be vacated. Plaintiff does not challenge the fact that if the Commission properly looked at antecedent material then its interpretation of the permit is correct. However, plaintiff contends that the Commission failed to apply proper principles governing interpretation of the permit, erred in finding that the permit was patently ambiguous, ignored the rules applicable to the delineation of radial and nonradial operating authority, erred in referring to extraneous matters for the purpose of construing the permit, and failed to consider plaintiff's status as an innocent purchaser.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action pursuant to 28 U.S.C. 1336, 2284; 2321-2325; and 49 U.S.C. 17(9).

2. The venue of this action is properly laid in this Court pursuant to 28 U.S.C. 1398 for plaintiff has its principal office in the Central District of California.

3. It is for the Commission to determine the scope of authority conferred by a certificate or permit and the Court will accept the Commission's interpretation if it is within the compass of the Commission's statutory authority, is not completely unreasonable, and is based on adequate findings supported by substantial evidence in the record.

4. A certificate or permit speaks for itself and unless it is patently indefinite or ambiguous, extraneous matters may not be referred to in order to interpret the authority, particularly when it is held by an innocent purchaser.

5. While ordinarily the presence of the words "between . . . on the one hand, and on the other . . ." indicates a radial authority and their absence a nonradial authority, the phrase is not a touchstone by whose presence or absence the permit must be construed.

6. Plaintiff interprets the permit as authorizing nonradial operation between any two railheads in the six states, between any two construction projects or other points of use in those states within 100 miles of any railhead in the six states, and between a railhead in any of the named states and a construction project or other point of use in the states within 100 miles of a railhead, or, where there is no railhead within 100 miles of a particular construction project or point of use, between the project or point of use and the nearest railhead. However, the permit likewise may be construed, without violence to the language, as allowing only radial service between railhead and construction project or other points of use within the circumscribed area.

7. The Court finds the permit is ambiguous and that the Commission properly resorted to the underlying record to aid in its construction.

8. The Court further finds that the Commission's order is within its statutory authority, is reasonable, and is based on adequate findings supported by substantial evidence in the record.

9. A good faith purchaser of a permit does not merit special consideration where the language of the permit presents such a glaring error or inconsistency that he should be put on guard.

10. The Commission's orders are lawful and should be affirmed and plaintiff's complaint should be dismissed, the temporary restraining order should be vacated, and judgment granted for defendants.

Made and entered this ... day of June, 1969.

STANLEY N. BARNES
Circuit Judge

THURMOND CLARKE
Chief District Judge

WILLIAM P. GRAY
District Judge

Presented by:

Counsel for Defendants

By: WM. MATTHEW BYRNE, JR.
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division

DZINTRA I. JANAVS
Dzintra I. Janavs
Assistant U. S. Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 67-1655-TC

Judgment

This action having come on for hearing on April 16, 1969, before this duly constituted three-judge District Court, and the Court having this day entered its Findings of Fact and Conclusions of Law to the effect that the order of the Interstate Commerce Commission complained of is valid and lawful in all respects, and that the complaint should be dismissed and the temporary restraining order vacated,

It is therefore, ordered, adjudged and decreed that the injunction prayed for be, and it is hereby, denied, that the temporary restraining order be, and it is hereby, dissolved, and that the orders and reports of the Interstate Commerce Commission are hereby affirmed.

This 3rd day of July, 1969.

STANLEY N. BARNES
Circuit Judge

THURMOND CLARKE
Chief District Judge

WILLIAM P. GRAY
District Judge

Presented by:

Counsel for Defendants

by: WM. MATTHEW BYRNE, JR.
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division

DZINTRA I. JANAVS
Assistant U. S. Attorney

APPENDIX D

Report and Order

M-11163 *Served Nov. 9, 1964*

INTERSTATE COMMERCE COMMISSION

No. MC-17745 (Sub-No. 5)[1]

CONTRACTORS CARGO COMPANY-EXTENSION OF OPERATIONS

Decided October 22, 1964

1. In No. MC 17745 (Sub No. 5), proposed operations found to be those of a common carrier by motor vehicle; applicant found not fit to perform the services proposed; and application denied.

2. In No. MC C 3607, defendant found to have exceeded the territorial scope of its permit and to have operated unlawfully as a common carrier by motor vehicle rather than as a contract carrier as authorized by its permit.

3. In No. MC C 3628, respondent found to have exceeded the territorial scope of its operating authority.

4. In Nos. MC C 3607 and MC C 3628, cease and desist order entered.

Donald Murchison for Contractors Cargo Company in each proceeding.

Warren N. Grossman for complaints in No. MC C 3607.

William L. Harrison for Bureau of Inquiry and Compliance in No. MC C 3628.

Tom B. Kretsinger, J. R. Welsh, R. V. Schuyeman, Eugene St. M. Hamilton, Warren N. Grossman, O. Russell

[1] This report also embraces No. MC C 3607, Asbury Transportation Company, et al. v. Contractors Cargo Company, and No. MC C 3628, Contractors Cargo Company, Investigation and Revocation of Permit.

Jones, Arthur H. Glanz, Pete H. Dawson, Bruce R. Geerquart, Phil Jacobson, Carl H. Fritze, and *Carl V. Kretsinger* for protestants in the title proceeding and intervenors in Nos. MC-C-3607 and MC-C-3628.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS HUTCHINSON, BUSH, AND BROWN

BUSH, *Commissioner*:

These three proceedings were heard on a common record and were the subject of a single report and recommended order. They are closely related, and will be treated herein in a single report.

Separate exceptions were filed by applicant and by certain protestants, complainants, and intervenors.[2] Applicant replied to the exceptions of the opposing carriers, and they and certain additional opposing carriers replied to applicant's exceptions.[3] Our conclusions differ from those recommended.

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[1] Contractors Cargo Company is an applicant, a respondent, and a defendant in the respective proceedings and will be referred to herein as applicant. The various protestants, complainants, and intervenors are named in appendix B. They will sometimes be referred to herein as the opposing carriers.

[2] Seven sets of pleadings were filed. These consist of (1) Exceptions of applicant, (2) Reply by Ashworth Transfer, Inc., Associated Heavy Specialized Carriers, Biggs Drayage Co., Consolidated Freightways Corporation, Leonard Bros. Transfer, Inc., Pacific Intermountain Express Co., Reliance Truck Co., Southwestern Transfer Co., Inc., St. Johns Motor Express Co., and Wilhelm Trucking Co., (3) Reply by Eagle Bros., Inc., (4) Reply by Navajo Freight Lines, Inc., and Western Truck Lines, Ltd., (5) Reply by Asbury Transportation Co., Aansa Transport Company, Dealers Transit, Inc., Owl Truck and Construction Company, Progressive Transportation Co., J. H. Rose Truck Line, Inc., Mitchell Bros. Truck Lines, Jeffries-Eaves, Inc., and Paxton Trucking Company, (6) Exceptions to that part of the examiner's recommendations which are favorable to applicant filed by Asbury, Aansa, Dealers, Owl, Progressive, Rose, Mitchell, Jeffries-Eaves, and Paxton, and (7) Reply by applicant to the exceptions of the opposing carriers.

The separate scopes of the application, the investigation, and the complaint are set forth in appendix A. The application essentially seeks motor contract carrier authority to transport construction materials and contractors' machinery, supplies, and equipment between points within a radius of 100 miles of all railheads in Arizona, California, Nevada, New Mexico, Oregon, and Washington.

Applicant claims that its existing permit authorizes the service for which authority is sought in the application. However, in addition to seeking interpretation of its permit, it has adduced evidence from the shippers in support of the application. The investigation asserts that applicant has operated beyond the territorial scope of its existing authority as described in appendix C. The complaint charges that applicant has not only exceeded the territorial scope of its existing authority but has unlawfully operated as a motor common carrier, and that applicant's existing authority to provide transportation to or from railheads requires a prior or subsequent rail movement, and that applicant has not adhered to that restriction.

The examiner concluded that applicant's existing authority (appendix C) is indefinite and ambiguous; that the Commission is warranted in going beyond the permit and looking to the proceeding in which a predecessor of applicant originally was granted this authority in order to determine what authority the Commission meant to grant applicant's predecessor; that a limited grant of authority from and to railheads was intended (appendix D); that the term "railhead" means a point on a railroad at which traffic may originate or terminate, and, although it implies that applicant would be concerned solely with traffic moving partly by railroad, this term should not be interpreted as requiring prior or subsequent rail movements; that applicant's present and proposed operations constitute *de facto* common carriage; and that, as a consequence, a grant of contract carrier authority is not warranted, and no authority should be granted here greater than that neces-

sary to modify applicant's existing permit in the manner described in appendix D. The examiner recommended that applicant's existing permit be modified and that the complaint and investigation proceedings be discontinued because the issues therein would be rendered moot by reason of the modification of applicant's permit.

Applicant excepts[4] (1) to the finding of the examiner that the circumstances here warrant going beyond applicant's permit to determine what authority was intended to be granted its predecessor in interest, (2) to the examiner's interpretation of its authority, (3) to the examiner's conclusion that the services provided by applicant under its contract carrier permit are those of a common carrier, and (4) to the examiner's failure to set forth the facts necessary to a full evaluation of the contract carrier criteria. Applicant claims that the proposed service is contract carriage per se, but that if the Commission should determine that this is in fact common carriage, applicant argues that it should be granted common carrier authority.

With respect to the authority presently held by it, applicant claims that the term "railhead" means any point at which rail facilities are maintained for the loading or unloading of rail cars or vessels and includes truck loading facilities of plants situated at the railhead. It further argues that its permit authorizes service (*a*) between any railhead in any of the six named States and any construction project or other point of use in any of such States located within 100 miles of any railhead in any of such States; (*b*) between any two railheads in any of the named States; (*c*) between any two construction projects or other points of use in any of the named States located within

[4] Applicant states that it agrees with the examiner's ultimate recommendation respecting the disposition of the complaint and investigation proceedings, that they be discontinued. It is clear, however, that its exceptions are pertinent to the issues in all three proceedings, and they will be treated accordingly.

100 miles of any railhead in any of such States; and (*d*) when no railhead is located within 100 miles of a construction project or other point of use in one of the six named States, transportation may be performed between such construction project or other point of use and the nearest railhead regardless of whether such railhead is in the named States or another State.[5]

In reply, certain opposing carriers suggest that the use of the term "railhead" implies a rail-haul limitation and that in other respects applicant's permit is ambiguous. They further argue that applicant has failed to establish that a grant of contract carrier authority is warranted; that because its application is premised on the contract carrier criteria, it has failed to show that the proposed service is required by public convenience and necessity; and that it has further demonstrated itself to be unfit to receive a grant of operating authority. Other opposing carriers argue that applicant's authority is not ambiguous and clearly authorizes only radial operations.

On exceptions to that part of the examiner's recommendations which were favorable to applicant, certain opposing carriers[6] argue that the term "railhead" should be interpreted as requiring a prior or subsequent rail movement; that applicant's past operations have been beyond the scope of its authority; that a cease and desist order should be entered in the complaint and investigation proceedings; and that applicant should be found to be unfit to receive a grant of operating authority. These opposing carriers expressly state that applicant's operations under its permit have been those of a common carrier and they should be enjoined by a cease and desist order. In reply, applicant argues that these exceptions are not well taken

[5] Page 84 of applicant's exceptions.

[6] Asbury, Azusa, Dealers, Owl, Progressive, Rose, Mitchell Bros., Jeffries-Eaves, and Paxton.

and that the Commission should adopt a line of reasoning similar to that set forth in its own exceptions.

The evidence, the examiner's recommendations, the exceptions, and the replies thereto have been considered. The examiner's statement of facts is substantially correct in all respects pertinent to the outcome of this proceeding, and, as amended herein, we adopt that statement as our own.

Territorial scope of applicant's existing authority.—As pertinent, applicant's present permit authorizes motor contract carriage as follows:

Construction materials and contractor's machinery, supplies, and equipment,

(1) Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or

(2) Between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.

The cardinal rule in interpreting motor carrier authority is that the carrier's certificate or permit must speak for itself. *T. I. McCormack Trucking Co., Inc.—Investigation*, 89 M.C.C. 5, 9. Consideration may properly be given to the circumstances surrounding the grant of such authority only if the authority itself is patently indefinite or ambiguous. If not, operating rights must be construed according to their terms regardless of what may have been intended at the time of their issuance. This rule is followed regardless of whether the practical result is to confer upon the carrier more or less authority than may have been intended to be granted originally. *C & E Trucking Corp.—Modification of Permit*, 88 M.C.C. 391, *Sims M. Transport Lines, Inc., Revocation of Certificate*, 66 M.C.C. 553.

The chief interpretative problem which must be resolved here is whether the first paragraph, quoted above, contemplates a grant of radial authority between railheads, on the one hand, and, on the other, construction projects, et cetera, within 100 miles of railheads, or whether the Commission in issuing this permit intended a broader nonradial grant which would allow it to operate freely between any two railheads, any two "construction projects or other points of use," or between a railhead and a construction project or other point of use. Subsidiary problems include whether the 100-mile radius must be drawn from the railhead actually used or from any railhead in the six States; whether a grant of radial authority was intended in the second paragraph quoted above; whether the language of the second paragraph defeats the 100-mile limitation of the first in whole or in part; whether the second paragraph authorizes applicant to perform transportation to and from railheads outside the six States named in the first paragraph; and whether use of the term "railheads" limits applicant to shipments having prior or subsequent movements by rail.

Ordinarily the absence from applicant's permit of the expression "on the one hand, and, on the other" would indicate that an authorization of unlimited nonradial operations between all of the described points was intended. Compare, *King Van Lines, Inc., Investigation of Certificate*, 84 M.C.C. 269. However, the language employed in applicant's permit is not sufficiently clear and concise to indicate conclusively that a nonradial grant was intended. For example, the first paragraph names the six considered States twice in a context which suggests that a dual "radial" grouping of service points was intended rather than a single nonradial group. If a nonradial operation was intended, the simplest way to state it in the permit would have been "between railheads, construction projects within 100 miles of railheads, and other points of use within 100 miles of railheads, in California, Arizona, New Mexico,

Oregon, Washington, and Nevada. Moreover, the second paragraph quoted above is connected with and dependent upon the first. Although the second paragraph does not use the "on the one hand, and, on the other" language, it clearly implies that only radial operations were authorized, and applicant admits this by advocating that this second paragraph be interpreted as cognizant of radial authority. (See summary of applicant's exceptions, above.) Additionally, the second paragraph appears to negate all or a large part of the immediately preceding limitation contained in the first paragraph, and leaves room for questioning whether the operations to and from territorial authorized in the second paragraph are or are not limited to the six States named in the first paragraph. After carefully reviewing these pertinent parts of applicant's permit, we are unable to conclude whether radial or nonradial operations were authorized in the first paragraph quoted above, and in other respects we find the language employed in the above quoted passages to be contradictory and unclear. Consequently, we conclude that applicant's permit is patently indefinite and ambiguous and that the record in the proceedings underlying applicant's permit must be examined in order to aid in its interpretation.

The application preceding the [illegible] authority was granted and upon which the subscribed permit is based was [illegible] of the Commission, [illegible] 13 M.C.C. 203, and was decided January 6, 1939. Examination of the record in the [illegible] case shows that the authority sought in the application was to engage in [illegible] transportation between railheads in the States of California, Arizona, New Mexico, Oregon, Washington, and Nevada, on the one hand, and, [illegible] of authorized construction projects in the same States, on the other. [Emphasis supplied.] The record also shows that [illegible] applied for authority to engage in transportation from railheads to construction projects and between camps and [illegible] [illegible] [illegible]

proceeding. In making a determination of the terms used in a carrier's operating authority, we customarily consider whether the words employed have acquired a meaning in the trade or industry which is different from their ordinary or academic meanings. *Black v. Interstate Commerce Commission*, 167 F. 2d 825 (6th Cir., 1948), certiorari denied, 335 U.S. [illegible]. Where, as here, there has not been shown to be an established meaning for a particular term peculiar to trade or industry, it is proper to consult the definitions in accepted dictionaries. *U. S. Motor Transport, Inc. v. Ellis Line Tours, Inc.*, 55 M.C.C. 530. Webster's New International Dictionary (2nd ed. 1947) defines "railroad" as (1) a point on a railroad at which traffic may originate or terminate, (2) a point on a railroad or a theater of operations at which supplies for troops are unloaded for distribution or forwarding, and (3) the end of a railroad (as of one under construction). Although the last of these meanings is not applicable here and the second is primarily of importance to the military, it is pertinent that none of these dictionary meanings suggest that the meaning of this term is limited to the exact railyard or other such real facility actually used. Rather the preferred definition speaks of it as being "a point." As used in the Commission's certificates and permits, authority to serve a point carries with it authority to serve a municipality and its commercial zone. Moreover, the analogous term "station on the railway" is used in many authorities issued by the Commission and has been interpreted as authorizing service from and to points within the commercial zones served by said stations. *New York Island Motor Transit Co. Ext. Hackensack-Rutherford*, 44 M.C.C. 130, 134 and *New York Central Transport Co. Modification*, 80 M.C.C. [illegible].

We conclude that motor carrier operating authority issued by the Commission to serve railheads is authority to serve any point on a "railroad" as [illegible] limited or subdivided. It is not limited to service performed

April 27, 1960, the examiner reviewed Hufnagel's operation. The report disclosed that he was operating in much the same way as Creston had proposed; that Hufnagle negotiated contracts to provide transportation services in conjunction with construction projects of 2 or 3 years duration; that he assigned equipment for a continuing period of time to the exclusive use of each shipper served; that he generally had active contracts with only four primary shippers at any one time although there might be as many as three active secondary or subsidiary contracts in connection with the same construction projects; that the services were tailored to meet the specific need of each individual shipper and that, consequently, the operations were in accordance with the usual definition of a contract carrier. In arriving at this conclusion the examiner, in addition to noting that Hufnagel had no more than four primary shippers, place emphasis upon the fact that he had five inactive contracts in effect and that he had requested to cancel them. No exceptions were filed and the examiner's report and order became effective as the order of the Commission on [illegible]

Hufnagel subsequently terminated the business and on January 19, 1962, control of applicant's stock was acquired by Ryan Wheeler Transport, Inc., a California intrastate carrier. At the time the transfer application was filed, applicant had no active contracts. By December 19, 1962, the initial date of hearing herein, that situation had terminated and eight additional contracts had been entered into, four of which were still in effect. Of the 10 contracts in force on December 19, 1962, only 3 had been in effect more than 6 months. Applicant no longer owns any motor vehicle equipment in the operation of each shipper. It leases its equipment from Ryan Wheeler and some of its equipment and some of its drivers are used interchangeably with that [illegible]

either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct needs of each individual customer."

To be sure, applicant maintains a few contracts which it considers to be of a "continuing" character. However, in view of applicant's extensive efforts to seek additional contracting shippers, applicant cannot properly be said to be serving only a "limited number of shippers." In only 11 months applicant's new management expanded the operations of a carrier having only 1 contract and which generally had no more than 4 primary contracts, and perhaps 3 subsidiary contracts, to a point where it had 16 active contracts and had in the interim commenced and terminated services under a number of additional contracts. Thus, it appears that applicant has offers transportation services to any shipper willing to contract with it, and that, in effect, it holds itself out to the public generally as a common carrier.

Armored Carrier Corp. Extension—Vermont, 92 M.C.C. 336. However, we do not consider that applicant's services possess a high degree of specialization not available from existing common carriers. Applicant no longer makes motor vehicle equipment available for the exclusive use of its shippers. There is nothing about the services which applicant would provide here, as a heavy hauler or as a carrier of pipeline (including pipeline stringing) and steel products which differ in any way from the services customarily rendered by common carriers regularly engaged in such operations. Although it claims to provide services suited to the distinct need of its shippers by providing "transportation conferences" and a fixed rate in advance for all services to be performed under a particular contract, it is apparent that many of its present and prospective shippers regard this merely as a means for applicant to estimate the cost of its services in completion (sic) with other available motor carriers.

By radically expanding the number of shippers served by it and by making its services available to any shipper willing to contract with it, applicant has abandoned operations as a contract carrier and has been operating unlawfully as a motor common carrier without appropriate authority. The abrupt and aggressive manner in which applicant transformed the contract carrier operations authorized by its permit into those of a common carrier leaves no room for us to assume that its present form of operation is the result of a gradual evolution of its operations over the years, or that they resulted in any manner through inadvertence. Rather it suggests that applicant's new management has deliberately expanded its operations into the common carrier field without giving consideration to whether its operations were compliant with the requirements of Section 203. This ignorance of, or deliberate flouting of, the requirements of regulation must be considered to render applicant unfit to be issued a grant of operating authority.

The cease and desist order herein shall enjoin applicant from further performance of its unlawful common carrier operations and shall further enjoin applicant from exceeding the territorial scope of its existing permit. The territorial scope of applicant's permit has been carefully reviewed above, and further comment thereon is unnecessary except to note that separate grants of contract carrier authority may not be tacked, and that it would be unlawful for applicant to attempt to tack that part of its authority discussed in this report to its Los Angeles Harbor grant, described in appendix C. See *T. T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561, at page 572. In order to bring its operations into compliance with the requirements of contract carriage, applicant must cease offering its services indiscriminately to all available shippers and must limit the number of shippers served by it.

In the application in No. MC-17745 (Sub No. 5), we find that applicant is not fit to perform the service proposed; and that the application should be denied.

In the complaint in No. MC-C-3607, we find that defendant has performed operations in California, Arizona, and Nevada, wherein it has exceeded the 100-mile radius described in its permit and has performed operations as a common carrier by motor vehicle without appropriate authority therefor and that it should be ordered to cease and desist and thereafter to refrain and abstain from such unlawful operations unless and until appropriate operating authority is issued therefor.

In the investigation in No. MC-C-3628, we find that respondent has exceeded the territorial scope of the operations authorized by its permit in the manner described in the paragraph next above and that it should be ordered to cease and desist and thereafter to refrain and abstain from such unlawful operations unless and until appropriate operating authority is issued therefor.

APPENDIX A

Authority sought:

By application in No. MC-17745 (Sub-No. 5), filed March 2, 1962, Contractors Cargo Company, of South Gate, Calif., seeks a permit authorizing operation as a contract carrier by motor vehicle, in interstate or foreign commerce, of construction materials and contractors' machinery, supplies, and equipment between points within a radius of 100 miles of all railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use within a radius of 100 miles of all railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, over irregular routes.

Complaint:

By complaint in No. MC-C-3607, filed April 5, 1962, Asbury Transportation Company, of Los Angeles, Calif., and other complainants[1] jointly allege that Contractors Cargo Company on three dates in February 1962 performed certain transportation in interstate or foreign commerce not authorized by its presently effective permit in violation of section 209(a)(1) of the Interstate Commerce Act and that the said transportation in fact was performed as a common carrier by motor vehicle in violation of section 206(a)(1) of the act. Complainants state they are informed and believe and on that basis allege that defendant has heretofore engaged in the transportation of a number of additional shipments not authorized in its presently effective permit, and that defendant intends to continue to solicit and transport shipments of such type and character contrary to the sections of the act above specified. They re-

[1] Azusa Transfer Company, of Azusa, Calif., Belyea Truck Co., of Long Beach, Calif., Paxton Trucking Company, of Montebello, Calif., Owl Truck and Construction Company, of Compton, Calif., and Progressive Transportation Company, of Compton, Calif.

quest that an order be entered commanding defendant to cease and desist from the alleged violations, and that such other and further order or orders be entered as the Commission may consider proper in the premises.

Investigation:

By order in No. MC-C-3628, of May 14, 1962, the Commission, Laurence K. Walrath, Vice Chairman, instituted an investigation under section 204(c) and 212(a) of the Interstate Commerce Act into the practices of Contractors Cargo Company to determine whether said respondent has been transporting commodities to points and places in Arizona, Nevada, and California beyond the scope of its presently effective permit, in violation of section 209 of the act. The order instituting the investigation further provides that in the event it is found that the respondent has willfully violated and is willfully violating said provisions of the act, an order may be entered forthwith suspending for a stated period, in whole or in part, the permit issued to the respondent and, if it is found that the respondent, whether willfully or otherwise, has violated or is violating such provision of the act, an order may be entered requiring it to comply therewith, and thereafter to maintain such compliance, and upon willful failure of the respondent to comply with such order the permit of respondent may be suspended or revoked in whole or in part. The Bureau of Inquiry and Compliance was directed to participate as a party in the investigation proceeding.

APPENDIX B

The following carrier is a protestant in the application in No. MC-17745 (Sub-No. 5):

Dallas & Mavis Forwarding Company.

The following carriers are protestants in the application in No. MC-17745 (Sub-No. 5), and interveners as their interest may appear in the investigation in No. MC-C-3628:

C & H Transportation Co., Inc., Western Truck Lines, Ltd., Ringsby Truck Lines, Inc., Fortier Transportation Co., Commerce Trucking Service, Garrett Transportation Co., Roy E. Cagle and Forrest L. Cagle, doing business as Cagle Bros. Trucking Service, and Associated Heavy-Specialized Carriers and its members Bigge Drayage Co., Ashworth Transfer Co., Consolidated Freightways Corporation of Delaware, Leonard Bros. Transfer Inc., Ashworth Transfer Co., Pacific Intermountain Express Co., Reliance Truck Co., St. John's Motor Express Co., Southwestern Transfer Co., and Wilhelm Trucking Co.

The following carriers are protestants in the application in No. MC-17745 (Sub-No. 5), interveners as their interest may appear in the investigation in No. MC-C-3628, and complainants in the complaint in No. MC-C-3667:

Asbury Transportation Co., Azusa Transfer Company, Dealers Transit, Inc., Owl Truck and Construction Company, Progressive Transportation Company, W. H. Rose Truck Line, Inc., Mitchell Bros. Truck Lines, Jefferson-Eayes, Inc. (sic), Whitfield Transportation, Inc., Paxton Trucking Company, Navajo Freight Lines, Inc., and Wells Cargo, Inc.

APPENDIX C

Applicant's present permit:

Construction materials and contractors' machinery, supplies, and equipment,

From Los Angeles, Calif., Harbor points, to sites of construction projects in California within 250 miles thereof; with no transportation for compensation on return except as otherwise authorized.

Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or

Between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.

APPENDIX D

Applicant's permit as recommended to be modified by the examiner:

Construction materials and contractors' machinery, supplies, and equipment, over irregular routes,

1. From any railhead in California, Arizona, New Mexico, Oregon, Washington, and Nevada to any construction project or other point of use in any of the named States within a radius of 100 miles of such railhead, except that service from the nearest railhead is authorized when no railhead is located within 100 miles of said construction project or other point of use.

2. From any construction project or other point of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada to any railhead in any of the named States within a radius of 100 miles of such construction project or other point of use, or from such construction project or other point of use, to the nearest railhead when none is located within 100 miles.

3. From Los Angeles Harbor points, including San Pedro, Wilmington, Terminal Island, and Long Beach, Calif., to sites of construction projects in California within 250 miles thereof.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 22nd day of October A. D. 1964.

No. MC-C-17745 (Sub-No. 5)

CONTRACTORS CARGO COMPANY-
EXTENSION OF OPERATIONS

No. MC-C-3607

ASBURY TRANSPORTATION COMPANY, ET AL.,

v.

CONTRACTORS CARGO COMPANY

No. MC-C-3628

CONTRACTORS CARGO COMPANY, INVESTIGATION
AND REVOCATION OF PERMIT

These proceedings having been duly instituted and full investigation of the matters and things involved having been made, and the said division on the date hereof made and filed a report herein containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof:

It is ordered in No. MC-17745 (Sub-No. 5), That the application be, and, it is hereby, denied.

It is further ordered in Nos. MC-C-3607 and M-C-3628, That Contractors Cargo Company, a corporation, of Los Angeles, Calif., be, and it is hereby, notified and required to cease and desist, and thereafter to refrain and abstain, from the practices relating to transportation in interstate or foreign commerce of the character found to be unlawful in the findings respecting each of those proceedings in said report.

And it is further ordered in Nos. MC-C-3607 and MC-C-3628, That the statutory effective and compliance date of this order, be, and it is hereby, fixed as December 7, 1964.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

(SEAL)

APPENDIX E

Report and Order

M-11649 *Served October 3, 1967*

INTERSTATE COMMERCE COMMISSION

No. MC-17745 (SUB-NO. 5)[1]

CONTRACTORS CARGO COMPANY—EXTENSION OF OPERATIONS

Decided September 1, 1967

Upon reconsideration, findings in prior report, 96 M.C.C. 306, affirmed in part and modified in part:

1. In Nos. MC-C-3607 and MC-C-3628, defendant-respondent, Contractors Cargo Company, found to have conducted motor carrier operations, in interstate or foreign commerce, beyond the territorial scope of its permits. Cease and desist order entered.

2. In Nos. MC-C-3607 and MC-C-3628, defendant-respondent also found to be engaged in operations, in

[1] This report also embraces No. MC-C-3607, *Asbury Transportation Company, et al.,* v. *Contractors Cargo Company,* and No. MC-C-3628, *Contractors Cargo Company, Investigation and Revocation of Permit.*

interstate or foreign commerce, as a common carrier by motor vehicle without appropriate authority in violation of section 206(a) of the Interstate Commerce Act by serving, ostensibly pursuant to its permit which authorizes operations as a contract carrier by motor vehicle, more than the limited number of shippers contemplated by sections 203(a)(15(and 209 of the act. Proceedings to this extent held open in order that defendant-respondent might elect a method of bringing its operations into conformity with the act.

3. In No. MC-17745 (Sub-No. 5), applicant, Contractors Cargo Company, found to have failed to establish that it is fit, willing, and able properly to perform additional services as a contract carrier by motor vehicle as defined in section 203(a)(15). Treating the application as one for a certificate, public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of described commodities between points in six States. Application denied.

Appearances as shown in prior report; and, in addition, *Eugene M. Malkin* and *Clarence D. Todd* for Contractors Cargo Company.

REPORT OF THE COMMISSION ON RECONSIDERATION

MURPHY, *Commissioner:*

Contractors Cargo Company (Contractors Cargo) holds a permit No. MC-17745, dated May 9, 1961, the history of which will be later detailed, authorizing, as here pertinent, the following operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes:

Construction materials and contractors' machinery, supplies and equipment, from Los Angeles, Calif., Harbor points to sites of construction projects in California within

250 miles thereof, with no transpotration for compensation on return except as otherwise authorized. Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.

The present three proceedings, which were heard on a consolidated record, involve primarily the determination of the permissible range of services, both territorial and otherwise, that may be performed by Contractors Cargo under this permit and a decision upon the merits of an application filed by that carrier assertedly to fill out any territorial deficiencies that may be found to exist in its permit.

In the prior report, 96 M.C.C. 306, division 1 found: (1) that both the second and third paragraphs of the Contractors Cargo's permit, quoted above, contemplate radial operations between "railheads," on the one hand, and, on the other, construction projects or other points of use; that the 100-mile radius in the second paragraph must be drawn from the "railhead" actually used by Contractors Cargo in serving a particular construction project or point of use; that no service is authorized in the third paragraph to or from railheads or other points of use outside the six States named in the second paragraph; that the term "railhead," as used in the permit, means any point on a railroad at which freight is loaded and unloaded; that the 100-mile radius must be measured from the municipal limits of such rail point or, where there is no municipality, from the rail facility itself; and that Contractors Cargo has exceeded its 100-mile radius as so measured between points in California, Arizona, and Nevada, and should be ordered to cease and desist from

such unauthorized operations; (2) that Contractors Cargo, by radically expanding the number of shippers served by it and by making its services available to any shipper willing to contract with it, has abandoned operations as a contract carrier by motor vehicle and has been operating unlawfully as a motor common carrier without appropriate authority; and that it should be ordered to cease and desist from such violations; and (3) that this deliberate expansion of its operations, without giving proper consideration to whether such enlargement was consistent with the contract carrier definition of section 203(a)(15) of the act, must be considered to render applicant *not* fit to receive a grant of additional operating authority; and that, therefore, the instant application should be denied. Finally, the division warned applicant that in order to bring its operations into compliance with the statutory requirements of contract carriage, it "must cease offering its services indiscriminately to all available shippers and must limit the number of shippers served by it."

Thereafter, Contractors Cargo filed a petition requesting that these proceedings be found to involve an issue of general transportation importance. It takes the position that the proceedings concern the only reported instance in which a permit holder has been ordered to cease and desist from serving "more than a limited number of persons"; that, rather, motor contract carriers in most similar instances have been allowed *either* to convert their operations to common carriage by filing an appropriate application under section 207 of the act *or* to bring their activities into conformity with the statutory definition of a contract carrier by motor vehicle; that the important issue now involved in these proceedings is whether motor contract carriers should be ordered to stop serving "more than a limited number of persons" in the absence of preliminary findings as to the number of persons which may be served without exceeding the maximum allowed under the act; and that it would be manifestly unfair to require

such carriers to act at their peril, only to be restrained at a later date from serving "more than a limited number of persons," without ever having been advised as to just what is the permissible number. By order of May 3, 1965, we denied the petition but, on our own motion, reopened the proceedings for reconsideration on the present record.

We adopt the statements of facts, conclusions, and findings set forth in the prior report of division 1 insofar as they pertain to the territorial scope of Contractors Cargo's existing permit, including the interpretation of the term "railhead" and the unauthorized operations conducted by Contractors Cargo in serving points in excess of its authorized 100-mile radius of railheads. The sole issues with which we are here concerned involve (a) Contractors Cargo's status as a contract carrier by motor vehicle and (b) the proper disposition of its extension application in No. MC-17745 (Sub-No. 5).

Preliminary Considerations

As of August 22, 1957, the definition of a "contract carrier by motor vehicle" in section 203(a)(15) of the Interstate Commerce Act was amended to read as follows:

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

The legislative history of the 1957 amendments of the contract carrier provisions of part II of the act clearly

evinces a Congressional intent to preserve the fundamental distinctions between common and contract carriers by motor vehicle and to overcome the effect of the decision in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409 (1956). This Commission had there determined that a motor contract carrier, through the active solicitation of some 69 transportation contracts, had so expanded its business as to become indistinguishable in operation from a common carrier by motor vehicle, and ordered it to cease and desist from such violations. In reversing that determination, the Supreme Court, relying on section 209(b) of the act as it was then written,[2] held that a contract carrier, rendering a specialized service in the sense that it hauled only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area, did not become a common carrier "holding itself out to the general public" merely because it reached for new business within the bounds of its permit. It declared:

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[2] At the time of the *Contract Steel* decision, section 209(b) excluded from the limitations this Commission could impose upon contract carrier authorities, "the right of the carrier to substitute or add contracts within the scope of its permit." As amended after that decision, that section empowers us to attach:

> * * * terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, * * * *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation of its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

"A contract carrier is free to aggressively search for new business within the limits of its license." 350 U.S. at 412.

This decision pointed up the difficulties that had been facing this Commission in trying to regulate the activities of motor contract carriers: We lacked the power to limit the number of contracts under which a contract carrier could operate; and while specialization of service was a factor to be considered by us in passing upon an application for a contract carrier permit, we could not prevent a contract carrier from later adding contracts for unspecialized services within the limits of its permit. As a result of these limitations on our regulatory powers, the operations of some contract carriers became more and more like those of common carriers.

The latitude thus recognized in contract carriers to engage in what is essentially common carriage, without at the same time subjecting themselves to regulation as common carriers, prompted the restrictive rewriting of sections 203(a)(15) and 209(b) in 1957. As stated in the House Report, the freedom accorded contract carriers in the *Contract Steel* decision "obliterates the distinction which Congress intended to make between common and contract carriers, and opens the door to unjust discrimination among shippers." H. R. Rep. No. 970, 85th Cong., 1st Sess. 3 (1957).

The 1957 amendment to section 203(a)(15) of the act prescribed three criteria to be used in determining whether a carrier's operations are or would be those of a "contract carrier by motor vehicle." The first, and most basic, test is transportation "under continuing contracts with one person or a limited number of persons." All motor contract carriers must conform to this standard which was intended to accord this Commission the power to limit effectively the number of shippers a contract carrier may serve. Compliance with either of the remaining tests,

"for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served," or "for the furnishing of transportation services designed to meet the distinct need of each individual customer," must be coupled with compliance with the basic test in order to bring a carrier within the statutory definition of a contract carrier by motor vehicle. See the Supreme Court's detailed discussion of this legislative history as set forth in its opinion in *Interstate Commerce Commisison* v. *J. T. Transport Co.*, 368 U.S. 81 (1961).

Neither section 203(a)(15) nor any other provision of the act, it will be noted, specifies what shall constitute a "limited number of persons." It is, rather, for this Commission to decide, under the facts of each case, whether a carrier serves a limited number of shippers. *P. Saldutti & Son, Inc.* v. *United States*, 210 F. Supp. 307 (D. N.J. 1962). And it is such a decision which we here must make in accordance with the clear standards enunciated by the Court in the *Saldutti* case.

Since the 1957 contract-carrier amendments it has uniformly been held by this Commission that "a limited number of persons" as specified in the definition of a contract carrier by motor vehicle does not necessarily mean an arbitrary figure which must be constant and not exceeded; but, rather, that it is to be determined after consideration of all the factors and circumstances surrounding a particular operation or type of motor-carrier service. *Armored Motor Service Co., Inc., Conversion Proceeding*, 77 M.C.C. 433 (1958). In that proceeding, division 1 found respondents, which served from 7 to 314 shippers, to be motor contract carriers serving a "limited number of persons" in view of (1) the inherently valuable commodities transported and the unusual and highly specialized protective services purveyed by respondents; (2) the historical grants of contract-carrier operating

rights to respondents and the development of their motor-carrier operations; (3) the economic objectives and benefits sought to be achieved by the 1957 contract-carrier amendments; (4) the legislative history leading to such amendments; and (5) the economic impact which any change in status would have on respondents immediately and upon their customers eventually. See also *Armored Carrier Corp. Extension—Vermont*, 92 M.C.C. 336, findings modified on further hearing, 102 M.C.C. 411.

This view was later expanded upon in *Frontier Delivery, Inc.* v. *Tioga Transport, Inc.*, 82 M.C.C. 536 (1960), and *Storch Trucking Co., Inc., Conversion Proceedings*, 82 M.C.C. 777 (1960). In the first of these proceedings, the problem was stated thusly:

> While the statute uses the words, "under continuing contracts with one person or a limited number of persons," we believe that the term "limited number," is a relative term without any particular significance unless compared to the overall operations of the defendant. Some factors to be considered are the different types of commodities transported, the number of permits under which the carrier operates, the territory in which the operation is conducted, and the similarity in the services that the carrier performs under its effective continuing contracts.

To these considerations and the historical tests applied in the *Armored Motor* case generally, the *Storch* decision added "the degree of specialization required by the nature of the business of the shippers involved," a criterion implicitly recognized in both the *Armored Motor* and *Frontier Delivery* cases, *supra*. See also *Tar Asphalt Trucking Co., Inc., Conversion Proceeding*, 88 M.C.C. 443, sustained *sub nom Tar-Asphalt Trucking Co., Inc.* v. *United States*, 208 F. Supp. 611 (D. N.J. 1962), affirmed 372 U.S. 596, Reh. denied 375 U.S. 917; *Umthun Trucking Co. Ext. Phosphatic Feed Supplements*, 91 M.C.C. 691; and *Cardinale Trucking Corp. Extension—Centreville, N. J.*, 92

M.C.C. 690, findings modified on further hearing, 100 M.C.C. 126. If a carrier's services possess little or virtually no specialization in their physical aspects, then the number of its contracts or shippers served must in the absence of countervailing considerations, show a real devotion to a very limited number of selected shippers. Stated somewhat differently, the number of shippers that may be served by a contract carrier, in the usual case, diminishes as the degree of specialization in physical services diminishes.

Finally, in the *Umthun* case, cited above, it was specifically recognized that it would be impossible to arrive at a number, applicable to every situation, beyond which a motor contract carrier may not go in adding contracting shippers. Division 1 there concluded:

* * * We believe that the applicant here, upon the execution of its seventh contract, reached that stage in its development at which the addition of another contract would require a finding that it has ceased to serve only a limited number of persons. The seventh contract will not of course, necessarily be the significant one in the development of the operations of other contract carriers. Some, providing highly specialized services, may properly serve many more shippers than this. * * * Those contract carriers whose services do not possess such a high degree of specialization [as armored car operators or carriers of migrant workers], however, are hereby put on notice that their attempts to expand their operations by offering service to more than six or eight separate shippers will be scrutinized with great care to insure that they are not thereby placing themselves in a position to serve more than the limited number of persons permitted them by section 203(a)(15) of the Act.

It is clear, therefore, that we must look to Contractors Cargo's overall operations in relation to these standards in order to determine whether it is still operating under

contracts with a "limited number of persons." It is equally plain, however, that no simple arithmetic or other formula is available which can be applied to a given set of facts and produce an automatic number of contracting shippers beyond which a contract carrier may not go and still remain a contract carrier. And just as there is no arbitrary maximum number of shippers above which a motor carrier will conclusively be presumed to be acting as a common carrier, there is no such arbitrary figure below which a motor carrier will conclusively be presumed to be acting as a contract carrier. Nor are the applicable standards such that they will always yield a definite maximum (or minimum) number of shippers that must be constant and unchanging. Rather, the governing criteria recognize that, as a practical matter, there must be some flexibility in the number of shippers that may be served at a given time by a contract carrier by motor vehicle, and that it is often the pattern of a carrier's operations and holding out of services that will be determinative of its status under the act. With these considerations firmly fixed in mind, let us now in their light examine all of the facts pertaining to the carrier status of Contractors Cargo in the hope that we may give that carrier some guidance as to the conduct of its future operations and as to the alternatives that will later be made available to it in this report.

Contractors Cargo's Status

The facts.—Contractors Cargo is authorized under its existing permit to transport construction materials and contractors' machinery, supplies, and equipment, (a) from Los Angeles, Calif., Harbor points, to sites of construction projects in California within 250 miles thereof; and (b) between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such

railheads; or between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof. Thus, service is authorized in six States, and literally thousands of commodities could be involved. "Construction materials" alone is a very broad commodity description. It is governed by the so-called intended use test and embraces, among others, all the many commodities included in the commodity description "building materials." *Mitchell Bros. Truck Lines—Investigation*, 91 M.C.C. 267, sustained in *Mitchell Bros. Truck Lines* v. *United States*, 225 F. Supp. 755 (1963), affirmed *per curiam*, 378 U.S. 125 (1964); and *W. T. Mayfield Sons Trucking Co.—Interpretation*, 92 M.C.C. 167, remanded on other grounds *W. T. Mayfield Sons Trucking Co.* v. *United States*, 234 F. Supp. 655 (1964).

This permit was acquired through purchase from William A. Hufnagel who in turn had acquired it from Constructors Transport Co. The last-named carrier had earlier obtained it from Ellsworth Pexton, of Los Angeles, Calif., doing business as Santa Fe Truck Company, to whom it was originally issued. Inasmuch as it is the contention of Contractors Cargo that its operations as a motor carrier are identical to those conducted by its predecessors, we believe it is only proper to compare the operations of Contractors Cargo with those conducted by its predecessors.

Paragraphs 2 and 3 of the subject permit, quoted above, were originally issued on June 21, 1941, to Ellsworth Pexton, doing business as the Santa Fe Truck Company, pursuant to an examiner's report and recommended order which became effective as the order of the Commission on January 6, 1939. *Pexton Extension of Operations—Coast States*, 13 M.C.C. 369. As indicated in that report, seven witnesses, each of whom either had used or was familiar with Pexton's past operations, appeared in support of the application " * * * and stated that the proposed services were not only consistent with the public interest but met

a definite public need." 13 M.C.C. at 372. Noting that Pexton's proposal envisioned the conduct of operations throughout a six-State area, the examiner stated (13 M.C.C. at 371):

* * * In support of this broad request, applicant explained that he is interested only in major construction projects offering a long period of employment. The shortest job which he has undertaken to date was in connection with the Imperial Valley Dam for the All American Canal, and continued for a period of 60 days only. Projects of the type in which he is interested obviously arise only infrequently and generally at remote or widely separated sites. While the territory within which he proposes to operate is extensive, it is clear that operations such as his cannot be confined to limited areas without causing serious embrassment in the placing of bids and the commencement of work on new projects at unanticipated locations. The permit herein recommended will cover the territory sought, particularly since there are no protests.

The commodities handled in the past and proposed to be handled in the future may be classified as construction materials, contractors' machinery, supplies, and equipment including particularly such items as reinforcing, structural, or fabricated steel cement in bulk or in sacks, lumber, machinery, explosives, and commissary and housing supplies including perishables iced in containers, tarpaulins and tents, knocked-down housing, and cots and bedding. The predominant movement is, of course, from railhead to construction sites. There is, however, a small return movement of excess materials and used equipment, machinery, and supplies. Operation in either direction between railheads and construction projects will be authorized.

The above authority was subsequently enlarged by the addition of paragraph 1 quoted at the beginning of this report pursuant to the decision under the "grandfather"

clause of section 209(a) of the act, of then division 5 in *Pexton Contract Carrier Application*, 18 M.C.C. 791. While this "grandfather" application, involving only California points, had been heard on the same record with the extension application described immediately above, it was the subject of a report and recommended order of a joint board, to which exceptions were filed by protesting rail carriers. In affirming the board, division 5 there stated, 18 M.C.C. at 793:

> All the above-described services have been performed over irregular routes and under special contracts with companies engaged in the construction of the aqueduct. These services were not available to the general public. Applicant considers himself a contract carrier, occupying, with respect to the particular construction project, the position of a subcontractor engaged in supplying transportation only. He is not concerned as to whether he shall be classified as a common or contract carrier, except that he anticipates considerable difficulty in the publication of a suitable tariff if found to be a common carrier. We think the operations described were and are those of a contract carrier. • • •

Thereafter, on December 19, 1947, the resulting consolidated permit was transferred to Constructors Transport Co., a corporation, also of Los Angeles which, in turn, sold it to William A. Hufnagel, doing business as Contractors Cargo Company. Hufnagel operated pursuant to the said permit from August 19, 1952, until he incorporated the business in November 1960, and sold control of its stock to Swan-Wheeler Transport, Inc., a California intrastate common carrier, on January 15, 1962. Following enactment in 1957 of section 212(c) of the act, however, many carriers holding permits to operate as contract carriers were issued certificates to operate as common carriers. That section required conversion of the authority of those permit holders whose operations on *August 22, 1957*, did not conform

to the new definition of a contract carrier.[3] In carrying out that program of conversion, the operations of all permit holders including the operations of the predecessor of Contractors Cargo were examined; and where there was doubt as to the nature of the operations being conducted by a carrier, a formal conversion proceeding under section 212(c) was instituted, looking toward the issuance of certificates in lieu of the permits held by the carrier.[4] In this review each contract carrier was required to respond to a questionnaire regarding its motor operations.

In response to this questionnaire William A. Hufnagel stated that during the period of July 1, to October 1, 1957, the average number of vehicles assigned to the exclusive use of each person served under contract was as follows: Merritt-Chapman & Scott Corporation—5 vehicles, J. H. Baxter & Co.—1 vehicle, Southern Nevada-Power Co.—1 vehicle, Pacific Gas and Electric Co.—18 vehicles; and that he then had effective contracts or agreements for the motor

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[3] Section 212(c) provided that "The Commission shall examine each outstanding permit and may within 180 days after the date this subsection takes effect institute a proceeding * * * and * * * revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect [August 22, 1957] do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

[4] This Commission reviewed the operations of the approximately 2,600 contract carriers when section 212(c) was enacted in 1957, but instituted only 750 formal conversion proceedings. Moreover, not all carriers involved in the formal proceedings were converted. Thus, a large majority of the carriers holding permits to operate as contract carriers were not converted to common carriers, and their status as contract carriers was thereby confirmed.

transportation of property with the following persons or firms: Merritt-Chapman & Scott Corporation, J. H. Baxter & Co., El Paso Natural Gas Company, Southern Nevada Power Co., Pacific Gas and Electric Co., Southern Pipe and Casing Company, The Republic Supply Co., and Owl Rock Products Company. Because Contractors Cargo's predecessor, Hufnagel, had effective contracts with eight different shippers a formal conversion proceeding under section 212(c) of the act was instituted.[5]

An oral hearing was held on March 3, 1960, and the examiner[6] found that the motor carrier operations of Hufnagel prior and subsequent to August 22, 1957, were those of a contract rather than a common carrier by motor vehicle. He recommended that the proceeding be discontinued. The examiner's report discloses that in 1960 Hufnagel assigned motor vehicles to the exclusive use of each person served under contract and that he had on file with this Commission eight contracts of which only three were said to be active at the time of the hearing. A review of our files now shows that the total number of contracts filed by Hufnagel was 49, of which 32 were filed during the years 1957-58. Thus, in 1957 Hufnagel served nine shippers prior to August 22, 1957, the critical conversion date,[7] and had two effective

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[5] Here, as in many cases, the number of contracting shippers has been determined from the answers to the Commission's questionnaire (described above) as well as from the evidence obtained in the involved conversion proceeding. A questionnaire was sent to each contract carrier to aid us in determining whether they remained such under the amended definition. Generally, if a carrier served three or less shippers, its contract-carrier status was not questioned, and no formal proceeding was instituted.

[6] The examiner's report and recommended order in this proceeding was entitled No. MC-17745 (Sub-No. 4), *William A. Hufnagel Conversion Proceeding;* and his order became the order of the Commission by operation of law.

[7] These were generally short-term contracts, no more than four of which apparently were in effect at any one time.

contracts on file with the Commission on that date. In all, Hufnagel filed 18 contracts with 12 different shippers during 1957. During 1958 Hufnagel filed 14 contracts with 11 different shippers, of which no more than 8 were evidently in effect at any one time. A similar review for the years of 1959 and 1960 shows that in 1959 Hufnagel filed nine contracts with nine different shippers of which no more than seven were shown to be in effect at any one time; and that in 1960 he filed two contracts with two different shippers and that the total number of shippers served in that year was five.

After Contractors Cargo's present management acquired control in January 1962, it commenced operations with only one effective contract. During the first year of its operations, however, Contractors Cargo filed with this Commission 59 contracts which involved service for 37 different shippers, and at the time of the hearing in this proceeding it had 16 effective contracts with 16 different shippers. Of the 59 contracts entered into by Contractors Cargo with 37 different shippers, 32 expired during 1962, 24 expired during 1963, and the remaining 3 are still active. During 1963 it filed 30 contracts with 28 different shippers of which 8 expired in 1963 and 22 expired in 1964. Seventeen contracts were negotiated by it, each for a different shipper, and all of these expired prior to November 11, 1966. Between January 1 and November 14, 1966, it filed 11 contracts of which 2 expired in January 1967, 2 expired in February 1967, 1 expired in March 1967, 2 expired in May 1967, and 2 expired in June 1967, and of which 1 is to expire in October 1967, and 1 is to expire in December 1967. As of June 29, 1967, petitioner again had on file with this Commission 14 effective contracts, each with a different shipper.[5] In certain instances, the contracts apparently

[5] Three of these contracts, however, were entered into in 1962 and were to expire either upon completion of the job or at some indefinite time. While it may be that they are no longer in force, Contractors Cargo has not notified us to this effect.

were negotiated in respect to a single shipment, as for example, a movement of a 90-ton crane from Paramount, Calif., to Las Vegas, Nev.; and in some instances the contracts apparently were restricted to specific construction projects. In respect to future operations, Contractors Cargo's president testified that "the number of contracts would be determined by the amount of my equipment and the amount of business available, and unfortunately this is limited." Contractors Cargo does not now assign motor vehicles to the exclusive use of any shipper.

Contractors Cargo asserts that its operations are designed to meet the distinct needs of each individual shipper served. In support of this contention, it particularly emphasizes that it offers to the shipper, through the use of so-called "transportation conferences," the benefit of a firm quotation of its charges prior to entering into a contract for the performance of service, and that such quotation covers all contingencies and all service contemplated, including the over-the-road transportation and, if desired, such other services as stringing of pipes, building of access roads, grading for the purpose of storing or stockpiling of construction materials, dismantling and reassembling of heavy machinery, use of special equipment for towing and pushing, and coordination of deliveries with construction schedules to assure availability of equipment, supplies, and materials at the jobsite when needed by the contractor. Contractors Cargo in 1962 moved silo doors from Los Angeles to missile bases in Arizona, some of which doors weighed 75 tons each and required development by applicant of the equivalent of a 32-tire trailer at an expenditure in excess of $25,000. It still had this equipment at the time of the hearing herein. Its president has had considerable experience in heavy hauling activities utilizing low-bed equipment, dollies, rigging, and gear for heavy loads weighing in excess of 100 tons, and has directed numerous pipe-stringing operations. Contractors Cargo's practice of giv-

ing a firm quotation of its transportation charges in advance of actual movement of a given shipment is regarded by the 11 shippers supporting the extension application (6 of which had contracts with Contractors Cargo in December of 1962) as a factor of major importance in the formulation of competitive bids on the supplying of materials for construction projects. A firm quotation of all carrier charges in advance of the rendering of service is said to be particularly advantageous in connection with sales of pipe required to be strung by the carrier. One of the shippers of pipe testified that the time between submission of a competitive bid on the furnishing of pipe and the commencing of the pipeline installation is normally not sufficient for appropriate tariff publication by a common carrier.

Discussion and conclusions.—Viewing the foregoing facts and circumstances in their entirety, we are convinced that division 1 correctly concluded in the prior report that the operations of Contractors Cargo have not been limited to those of a contract carrier by motor vehicle as defined in section 203(a)(15) of the act. Initially, it must be observed that Contractors Cargo no longer assigns equipment for a continuing period of time to the exclusive use of each shipper served[9] and that its general services, which appear to be neither unusual nor highly specialized, have not been shown to be tailored to meet the distinct needs of each individual customer. These facts are most directly and persuasively demonstrated by the many short-term contracts entered into by Contractors Cargo since the inception under the present management of that corporation's

[9] At the time of the conversion proceeding (1960) Hufnagel did assign vehicles to the exclusive use of each person served, and the present management of Contractors Cargo commenced operations in January 1962 with but a single effective contract, the practical equivalent of exclusive vehicle assignment. Contractors Cargo's present operations differ radically.

operations, as well as by the nature of the physical services assertedly desired by the shippers supporting the extension application as described at a later point in this report and in the appendix hereto. Short-term contracts of the sort here under consideration, which contemplate only one or a few movements, obviously are not intended to fulfill the total transportation needs of the shippers served (who do not regard Contractors Cargo as their exclusive carrier) and differ markedly from those under consideration in the original *Pexton* proceedings. Indeed, they may not even satisfy the basic requirements established in *Contracts of Contract Carriers*, 1 M.C.C. 628. With the exception of the so-called "transportation conferences," there is nothing about the services applicant now affords its contracting shippers which differs in any way from the services customarily rendered by common carriers regularly engaged in serving the heavy construction industry. All that is required is expeditious and dependable point-to-point transportation at reasonable rates. The equipment generally utilized by applicant is not in itself different from that regularly employed by common carriers engaged in heavy hauling or pipe-stringing operations or in serving the construction industry generally. The record shows only one instance where applicant expended any substantial sum of money to modify its equipment for a particular job; and the details concerning this particular modification are not of record and the equipment is still being used by Contractors Cargo despite the termination of the project for which it was developed. Contractors Cargo's strict observance of shipper-designated loading and unloading hours is not alone enough to establish that its service partakes of an unusual degree of physical specialization; it simply reflects sound business practices. Shippers served by it basically desire 8 a.m. delivery when requested, jobsite delivery on certain shipments, and trained drivers. These are services which shippers engaged in the construction industry generally expect, and daily receive, from duly

authorized common carriers. The fixed cost feature of the "transportation conferences" arrangement will be discussed in detail later in this report but, in our opinion, has not been shown to be of material importance to the efficient and economical operation of the business activities of the shippers now served by Contractors Cargo. There is here no evidence concerning the specific level of rates charged by Contractors Cargo and its common carrier competitors, and we are therefore unable to find that Contractors Cargo's present service is tailored to the length of the shippers' purse within the meaning of the decision of the Supreme Court in *Interstate Commerce Commission* v. *J-T Transport Co., supra.*

In brief, the shippers served by Contractors Cargo have failed to establish that they possess any transportation requirements distinct from other similarly situated shippers; and it is plain, though not of controlling significance, that the services rendered by Contractors Cargo have not been such as should be performed by a motor contract carrier. Compare the *Saldutti* case, *supra*, 210 F. Supp. at 312.

Thus without the necessity of applying the "limited number of shippers" standard of the statutory contract carrier definition, we are unable to find that Contractors Cargo's past operations have been confined to those authorized by virtue of its outstanding permit. It is evident, therefore, that in order to bring its operations into conformity with the statutory definition of a contract carrier by motor vehicle, an option later made available to it in this report, Contractors Cargo will be required to reexamine its entire method of doing business. It cannot cure its unlawful operations simply by reducing to a given level the number of shippers served, because in addition to offering its services to the general public, as hereinafter discussed, Contractors Cargo has failed either to tailor its services to meet the distinct needs of each individual shipper or to assign ve-

hicles for a continuing period of time to the exclusive use of each of its customers.

Assuming that Contractors Cargo attempts, as it must under its present authority, to conform its operations to the section 203(a)(15) definition of a contract carrier by motor vehicle, by either dedicating equipment to each shipper served or by meeting the distinct need of each, it is possible that it would still be faced with the question of how many such shippers it may lawfully serve.[10] In this respect we think that the number of contracts entered into, and the number of shippers served, by Contractors Cargo since the assumption of control by its present management in 1962 clearly indicates that its operations are materially different from those conducted by its predecessors, and that considering its overall operations the number of shippers served by it have exceeded the "limited number of persons" which lawfully may be served under its permit.

Although Contractors Cargo now holds only a single effective permit, albeit a consolidated one, the services it generally provides each of its contracting shippers appear to be similar in all material respects, are in no manner unique, and have not been shown to require a high degree of specialization. Nor, does it appear that the nature of the business of the shippers served by Contractors Cargo requires an integrated transportation service materially different from that provided them by duly authorized com-

[10] We do not agree with the theory that if a carrier either dedicates equipment to or meets the distinct need of each shipper served, its service automatically will be limited thereby to "a limited number of persons." However, such compliance may, as a practical matter, either substantially relieve or even obviate the present problem concerning the maximum number of shippers that Contractors Cargo may serve. The resulting integration of shipper and carrier effort alone may preclude any general holding out or the rendition of service to any substantial number of shippers.

mon carriers, or the devotion to them of the equipment or services of a carrier which would become virtually a part of their organization. The commodity description embodied in Contractors Cargo's permit is, as previously noted, a broad one which is governed by the so-called intended use test and which embraces a myriad of essentially dissimilar commodities. The excerpt quoted from the examiner's report which led to its issuance (13 M.C.C. at 371) bears ample testimony to the broad commodity and territorial scope of this authority. And even though the phrase "a limited number of persons" is considered to be relative to, among other things, the commodities authorized to be transported and territory authorized to be served, a carrier is not necessarily allowed a "few shippers for each commodity" as plaintiff unsuccessfully contended in the *Soldatti* case, *supra*; nor should it necessarily be allowed a "few shippers for each point or State" authorized to be served.

The number of shippers whom Contractors Cargo can physically serve under its permit description appears virtually unlimited. Contrary to its contention that its "services are clearly confined to a specific class of persons, *i.e.*, contractors," Contractors Cargo is able under its commodity description to serve all contractors, all persons engaged in the building and construction trades, and all persons (including manufacturers and distributors) supplying contractors and such building and construction tradesmen. It is, therefore, readily apparent that neither the territory nor the commodity limitations in Contractors Cargo's permit automatically restrict it to serving a "limited number of persons."

Considering all of these factors, we believe that Contractors Cargo, like other motor contract carriers whose services also do not possess a high degree of specialization, should have carefully scrutinized its overall operations in the light of the amended section 203(a)(15) contract carrier definition when it first found it necessary or

desirable thereafter to expand its operations by offering services to more than seven or eight shippers, which was the number its predecessor (Hufnagel) was serving at the time his operations were reviewed in the conversion proceeding, and the most that it had served at any one time prior to the change in management in January 1962. It is noteworthy that in the *Umthun* case, *supra*, 91 M.C.C. at pages 696-97, it was found that a contract carrier finding itself serving six to eight shippers should examine its operations in order to insure that it was not thereby placing itself in a position of serving more than a "limited number of persons." Service to more than six or eight shippers, however, is not precluded under the *Umthun* principle; such service will only be examined with great care in order to determine a carrier's compliance with the first, and most basic, part of the contract carrier definition. In the instant proceeding we see no logical reason, and Contractors Cargo has failed to present any rational basis, for enabling it to expand its services beyond this number. And while it is true that some flexibility in operations is desirable, and perhaps even necessary in view of the type of service provided by Contractors Cargo to construction and similar-type projects generally, we think that holding this carrier to serving a maximum of eight shippers will provide sufficient flexibility and enable it to perform a reasonably economical and practical transportation service.

Stated differently, we are unable on the present record to find in Contractors Cargo's service such a high or unusual degree of physical specialization as might allow it (along with the armored carriers and transporters of migrant workers mentioned in the *Umthun* case, *supra*) to serve either a large number or a sizeable class of shippers. It is true that the coordination of deliveries to shippers' precise schedules, the design of special devices for loading and unloading, and the unusual instance in which its equipment is modified and constructed to perform such services, coupled with a complete survey of the shippers' require-

ments and a subsequent firm bid embracing all service contemplated, all tend to show some specialization in the physical services offered by Contractors Cargo. But it is equally true that such specialization of physical services, when contrasted with those regularly performed by common carriers serving the same industry, cannot be said to place Contractors Cargo's operation at a level of specialization higher than that of the ordinary motor contract carrier referred to in the *Upthun* case, *supra*. The factors relied upon by Contractors Cargo to establish that its service is so highly specialized as to enable it to serve a large number of shippers do not approach those referred to in the armored carrier cases or in those cases pertaining to carriers of migrant workers. A different conclusion in this respect would obliterate any practical distinction between the services of Contractors Cargo and those of its common carrier competitors and would accord Contractors Cargo a favored status over those competitors.

A conclusion that Contractors Cargo must now return to a position where it will be serving no more than eight shippers under continuing contracts, provided the other requirements of section 203(a)(15) are met, and absent any special considerations that may arise in the future, is, as already suggested, reinforced by the history of its permit and the operations performed thereunder by it and its predecessors. Seven witnesses, each of whom either had used or was familiar with the past operations of one of Contractors Cargo's predecessor (Pexton), appeared in support of the original applications pursuant to which the permit here in question was issued. In 1957 its predecessor (Hufnagel) who then assigned vehicles to the exclusive use of each of its customers, served *five* shippers under active contracts and had *three* more contracts which were "apparently inactive." And in 1960, at the time of the hearing in the *Hufnagel Conversion* case, *supra*, its predecessor again had eight contracts, only three of which were said to be active. Eight appears to be the maximum num-

ber of shippers served by Contractors Cargo's predecessors at any one time prior to January 15, 1962, when the operating authority here in issue was acquired through purchase by Swan-Wheeler, Inc., an intrastate motor common carrier, of the outstanding capital stock of Contractors Cargo. In less than 1 year after that purchase, however, it appears that Contractors Cargo's operations had expanded to the point where it had entered into 59 contracts with 37 different shippers, and was providing service under 16 active contracts with 16 different shippers.

It seems plain from this record that immediately following January 15, 1962, the time of the acquisition, Contractors Cargo embarked upon an expansion program under which it no longer stood aloof to the lure of a public calling but, instead, changed its operations from those of a contract carrier to those of a common carrier by motor vehicle. The division's finding to this effect is in accord with the evidence and governing law. It is only fair and just now to require Contractors Cargo to return to the point where it was prior to the time that it embarked upon its expansion program. To decide the matter otherwise would, as was stated in *Council Transport Co., Inc., Conversion Application*, 93 M.C.C. 312, 319, discussing an analogous program, "result in an obvious windfall to the * * * [carrier's] underserved benefit and to the detriment of existing carriers." In order to bring its operations into conformity with the section 203(a)(15) contract carrier definition, Contractors Cargo should consequently be required to return its overall operations to the launching pad from which they soared in January of 1962.

To require that Contractors Cargo, in order to remain a motor contract carrier, now return its operations to substantially the same position they were in prior to January 1962 does not mean, however, that it will forever be foreclosed from serving in excess of eight shippers. Rather, the conclusion as to what is permissible at the present

time must be tempered by a realization that special situations and circumstances do arise that may warrant extending this carrier's service to somewhat more than eight shippers. Should this occur, Contractors Cargo will have ample opportunity to present to this Commission (by the filing of an appropriate petition along with its tendered contract or contracts) its plan of operation and the circumstances it believes to warrant such an increase, and this Commission under the second proviso of section 209(b), quoted in footnote 2 above, will have adequate authority to determine whether the proposed increase should be allowed.

Even though we think that, at the present time and in the absence of special considerations Contractors Cargo must reduce to eight the number of shippers with whom it has contracts for service in order to continue to qualify as a contract carrier by motor vehicle as defined in the act, such action would neither automatically nor conclusively qualify it as a motor contract carrier. As we stated earlier in this report, just as there is no arbitrary maximum number of shippers above which a motor carrier will conclusively be presumed to be acting as a common carrier, there is no such arbitrary figure below which a motor carrier will conclusively be presumed to be acting as a contract carrier. Restoration of bona fide operations as a contract carrier will require substantial further changes in Contractor Cargo's operations. Either these operations must be altered so as to be designed to meet the distinct needs of each shipper served or Contractors Cargo must assign equipment to the exclusive use of each such shipper for a continuing period of time. In addition, the identity of the shippers served by Contractors Cargo should achieve greater stability than in the past. The easy turnover and substitution of contracts now characterizing its operations should largely disappear. If Contractors Cargo will conscientiously refrain from offering its services to the public at large and make them available only to those shippers who have distinct transportation needs which can be met

by either the exclusive assignment of vehicles or the type of specialization to be achieved as required above, then the too ready replacement of terminated contracts with an equal or greater number of new contracts, which has consistently marked Contractors Cargo's operations in the past, should give way to longer term mutual interests and a minimum of contract shifting.

Considering all things, we are of the opinion that by adding to the number of shippers served in the manner described above and by making its services available to virtually any shipper who desires them, Contractors Cargo has exceeded the scope of contract carriage contemplated by the statute and has been operating unlawfully as a contract carrier by motor vehicle. We note, however, that the facts and circumstances leading to the original issuance of the subject permit to Contractors Cargo's predecessor (Pexton) presented what was even then considered to be a borderline situation concerning the essential distinction between common and contract carriage. Although the determination there made that such operations constituted those of a contract carrier by motor vehicle was probably a correct one under the applicable statutory standards as they then existed, it is conceivable that today, with the changes in the act's definition of a contract carrier by motor vehicle enumerated earlier in this report, such operations might well have been found to be those of a motor common carrier for the reason that the clientele to be served may be too transient to permit an efficient and economical operation as a contract carrier serving a limited number of shippers. In there approving the issuance of a permit and subsequently confirming the contract carrier status of Contractors Cargo's predecessor (Hufnagel) on the basis of the limited information and representations made in the *Hufnagel Conversion* proceeding, we may have unwittingly contributed to a situation which made it easy for Contractors Cargo to slip into common carrier operations; but we did not approve or create a situation in which bona fide

operation as a contract carrier by motor vehicle was impossible of accomplishment. Every applicant for contract carrier authority necessarily undertakes, and has the obligation, if the application is granted, to see to it that he does not assume the status of a common carrier. *Gollock Extension of Operations*, 1 M.C.C. 161, 165; and *Oilfields Trucking Co.—Purchase—Dunbar*, 5 M.C.C. 137, 139. Contractors Cargo's unauthorized common carrier operations can find no justification in the fact that we may have accepted too readily its predecessor's undertakings to operate only as a contract carrier.

Presumably Contractors Cargo and its predecessors understood the limitations inherent in their proposals to operate as a contract carrier. In any event, they represented that they were able and willing so to operate and they must be held now to that undertaking. They have never proposed, nor undertaken to justify, operations as a common carrier and Contractors Cargo's failure to operate as a contract carrier cannot now be excused by problems inherent in the situation which it and its predecessors have promoted.

In view of the foregoing considerations and based upon our further examination of the antecedents of the operations of Contractors Cargo, however, we are not convinced that this carrier has deliberately expanded its operations into the common carrier field without regard to the requirements of regulation. For this reason we do not believe that Contractors Cargo's past unlawful conduct has been willful, and we conclude that the entry of a cease and desist order would not be appropriate until that carrier has been given an opportunity to bring its operations into conformity with the principles expressed in this report.

In view of these conclusions we believe that several courses of action are open to Contractors Cargo. First, it may reduce the number of shippers served under its permit

and return to the same position of its predecessors and serve no more than eight shippers, providing, of course, that it tailors its services to meet the distinct needs of each individual shipper or assigns equipment for a continuing period of time to the exclusive use of each shipper served. Second, should Contractors Cargo wish to assume the obligations of common carriage, it may apply under section 207 of the act for conversion of its permit to a corresponding certificate of public convenience and necessity. Finally, if it believes that some other course of action should be followed, it may present such a plan for our consideration within the time specified. Compare *E. A. Gallagher & Sons* v. *Cleveland General Transport*, 98 M.C.C. 356.

We conclude that the proceedings in Nos. MC-C-3607 and MC-C-3628, insofar as they pertain to the operations conducted by Contractors Cargo in serving more than a "limited number of persons," should be held open for a period of 90 days in order to afford it the opportunity to pursue one of the courses outlined above. Contractors Cargo will be required, on or before the expiration of such 90 day period, to file with this Commission and serve upon all other parties of record a verified statement detailing the steps it is taking to end the violations described herein and to achieve compliance with the applicable law and regulations in respect of all operations conducted under its permit to perform transportation services as a contract carrier.

The Extension Application

The Facts.—The next matter that requires our attention is the contract carrier application filed by Contractors Cargo in the Sub-No. 5 proceeding, wherein it seeks a permit authorizing operations as a contract carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of construction materials and contractors' machinery, supplies and equipment between points within

a radius of 100 miles of all railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada.

Contractors Cargo under the authority it acquired from Hufnagel has been transporting a wide variety of commodities for numerous shippers throughout the six-State area authorized in its permit. Although it does not assign motor vehicle equipment to the exclusive use of any shipper, it operates a sizable fleet of equipment and anticipates no problems in providing suitable vehicles for the movement of the supporting shippers' products between the points under consideration here. It believes that the most attractive feature of the service that it performs for the manufacturers and contractors which have used its transportation facilities is its "transportation conference." Through the use of such a "conference" Contractors Cargo is able to advise a shipper what engineering or transportation problems it may encounter on a specific movement and what the overall cost of such a movement would be. If the authority sought is granted it proposes to offer each of the supporting shippers the benefit of its engineering and transportation experience and to provide a prompt and dependable service based on a fixed transportation charge for the movement of traffic.

Eleven manufacturers and contractors located at Alhambra, Compton, Downey, Hollydale, Los Angeles, Paramount, Riverside, South Gate, and Torrance, Calif., support the application. Evidence presented by these 11 shippers showing (a) their names and the types of commodities manufactured or services provided, (b) origin and destination points of their traffic, (c) equipment and special road permit requirements, and (d) frequency of shipments during the year preceding the instant hearing and carriers used is summarized in appendix A. All are engaged in competitive bidding with other manufacturers and contractors of like items throughout the area here under consideration. Each believes that having Contractors Cargo's proposed "fixed-transportation-cost" service

available to it will strengthen its present sales position in California and neighboring States and enable it to compete effectively for new construction contracts in this area as they become available. Appendix A also details the amount of traffic each shipper assertedly would tender to Contractors Cargo upon approval of this application.

Twenty-six motor carriers presented evidence in opposition to the application. All operate extensive fleets of equipment and a summary of their ability to perform the service proposed and extent of service performed for the shippers supporting the application is set forth in appendix B. Protestants oppose the application mainly because they fear that a grant of authority will unduly strengthen Contractors Cargo's competitive position and divert traffic from them.

Discussion and conclusions.—For the following reasons we think this extension application must be denied. The proposal here to serve 11 different supporting shippers as a contract carrier by motor vehicles fails, at the outset, to satisfy the basic "limited number of persons" test of the section 203(a)(15). Only one of the supporting shippers is presently served by applicant according to the contracts it has filed with this Commission, and approval here would thus result in the expansion of Contractors Cargo's services to a total of 24 shippers, a result plainly not contemplated by the statute. See the *Saldutti* case, *supra*. Moreover, applicant will not assign vehicles to the exclusive use of any of the supporting shippers for a continuing period of time; and as such, its proposal fails, regardless of whether Contractors Cargo is seeking initial contract carrier authority or, in this instance, additional authority to serve the 11 supporting shippers, to conform to part (a) of the statutory definition of contract carriage.

With respect to part (b) of that definition applicant's proposed service cannot be classified as designed to meet the distinct transportation needs of any of the 11 shippers

it proposes to serve under the authority sought. We think that the testimony of each shipper supporting the application that the proposed service would be used only "if the cost was right," "if the price was right," or "if the rates are acceptable" are clear indications that applicant's proposed service including its "transportation conference" are not of such a distinct nature as to make it a contract carrier in this instance. We further believe that applicant's utilization of a "transportation conference" and its subsequent offer of performing a service for a "fixed" cost does not on this record show that such conferences or services have met or will meet the distinct needs of any of the 11 shippers supporting the application. There is no evidence concerning the level of the rates that would be charged by Contractors Cargo in contrast to those charged by its common carrier competitors, and we are therefore unable to find that the proposed service is tailored to meet the length of the shippers' purse within the meaning of the *J-T Transport* case, *supra*. Much of the considered traffic is already moving by existing motor common carriers, and there is here no convincing showing that applicant's rate proposals would be anything more than a convenience in the competitive bidding (selling) activities of its supporting shippers. Nor do we believe that the mere fact that applicant is willing to offer its transportation and engineering experience to the supporting shippers compels a conclusion that a denial of applicant's proposed service would, economically or otherwise, deprive these shippers of any needed motor transportation services. The service heretofore performed by applicant for some of the shippers supporting the application, when considered in the light of the evidence of record as to what it here proposes, is, in our view, a service that is available from the common carriers listed in appendix B.

All things considered, we are of the opinion that applicant's proposal in the Sub No. 5 proceeding fails to meet the section 203(a)(15) definition of a contract carriage car-

ever, by motor vehicle. Accordingly, the application in the Sub No. 5 proceeding, insofar as it requests contract carrier authority, will be denied inasmuch as applicant has failed to establish its fitness, willingness and ability properly to perform service as a motor contract carrier. See section 209(b) and *Eddleman Bros. Contract Carrier Application*, 98 M.C.C. 681. An appropriate finding will be made in that respect.

We are convinced that the service proposed by Contract Cargo in the Sub No. 5 proceeding is actually that of a common carrier by motor vehicle and that it should be disposed of as one for common carrier authority. Before a certificate may be granted, however, it is incumbent upon the applicant to establish by convincing evidence that there is a real need for the proposed operation and that existing carriers are unable or unwilling to provide such service. In our opinion applicant has failed to sustain this burden of proof. While the supporting shippers profess a desire for the proposed service, their transportation needs are now apparently being met satisfactorily by existing motor carriers who are presently transporting all traffic tendered to them and who desire and are capable of accumulating more. It is clear then that the service available cannot be found to be wanting in any material respect and that existing carriers are entitled to transport the involved traffic without additional competition from applicant's proposed service. Even were we to find (as we cannot) that applicant has discharged the burden of proving that the present and future public convenience and necessity require the proposed operation, however, we could not approve the issuance of a certificate in view of the dual operations ban, section 210 of the act which would thereby result. As to this point, it is sufficient to note that applicant now is evidently serving as a contract carrier out of the shippers supporting its application (except D. Robertson, Inc.) and that the opportunities for discrimination and undue preference or prejudice against which section 210 of the act is aimed would thus seem apparent. For all these

reasons we conclude that the extension application must be denied.

Findings

On reconsideration in No. MC 17745 (Sub No. 5), we find that applicant has failed to establish that it is fit, willing, and able properly to perform the services of a contract carrier by motor vehicle as defined in section 203(a)(15) and to conform to the provisions of part II of the Interstate Commerce Act and the lawful requirements, rules, and regulations of the Commission thereunder; and that, therefore, section 209(b) of the act requires that the application for contract carrier authority be denied.

In No. MC 17745 (Sub No. 5), we further find on reconsideration that viewing the substance of the application, the proposed service is actually that of a common carrier by motor vehicle; that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; and that the application should be denied.

In the complaint in No. MC-C-3607 and in the investigation in No. MC-C-3628, we find on reconsideration that defendant-respondent, Contractors Cargo Company, has performed operations in California, Arizona, and Nevada wherein it has exceeded the 100-mile radius described in its permit; and that it should be ordered to cease and desist and thereafter to refrain and abstain from such unlawful operations unless and until appropriate operating is issued therefor.

In the complaint in No. MC-C-3607 and in the investigation in No. MC-C-3628, we further find on reconsideration that Contractors Cargo Company has been operating, in interstate or foreign commerce, as a common carrier by motor vehicle in the manner set forth in this report without appropriate authority in violation of section 206(a) of the act; and that an order should be entered (a) holding

these proceedings, Nos. MC-C-3607 and MC-C-3628, open for a period of 90 days or for such further period of time as this Commission may authorize, and (b) requiring Contractors Cargo Company to file with this Commission and serve upon all parties of record within such time period a verified statement detailing the steps it is taking to bring its operations into conformity with the requirements of the Interstate Commerce Act and our rules and regulations thereunder.

An appropriate order will be entered.

COMMISSIONERS BROWN and HARMAN concur in the result.

VICE CHAIRMAN TIERNEY, dissenting in part:

These proceedings must be viewed in a posture different from that of an applicant seeking initial entry into the contract-carrier arena or from an applicant presently serving 6 to 8 shippers under permits issued by us pursuant to the 1957 amendments of the contract carriage provisions of part II of the act and who seeks to serve an additional shipper. Contractors Cargo's permit does not limit its service to specified shippers or a specific number of shippers.

Under section 212(c) Congress authorized us to review the operations of this carrier's predecessor and if we found that those operations did not conform to the amended definition of contract carriage, we were empowered to convert that carrier's (respondent's predecessor) authority to common carriage. We reviewed those operations in No. MC-17745 (Sub-No. 4), *William A. Hufnagel Conversion Proceeding*, and found them to be contract carriage. We did not "freeze," or in way specifically limit, those operations in that case or in a separate rulemaking proceeding to insure Hufnagel's and similarly situated carriers' adherence to the amended definition of contract carriage.

When Contractors Cargo acquired the involved authority on January 15, 1962, through purchase, and the permit was reissued, this Commission took no steps to restrict

the reissued permit in order to insure that the service would be performed only for specified shippers or for a specific number of shippers.

Keeping in mind this background of the involved authority and our role therein, I believe that the majority errs in requiring Contractors Cargo to do anything more than reduce, within a "reasonable" period of time, to eight the number of contracts it has with shippers. In my opinion the definition of "reasonable" should be sufficiently elastic so that respondent will not be forced to abrogate presently effective contracts. Once the number of contracts has been reduced to eight, I view the majority's implied use of the "unusual and highly specialized" test to be statutorily erroneous.

The second of two statutory requirements is phrased in the alternative:

> either (a) for the furnishing of transportation vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer

The evidence indicates that the carrier is continuing to furnish a comprehensive transportation service between railheads and construction projects, designed to meet the distinct need of each individual customer. This is recognized, in particular, by the carrier's coordination of deliveries with construction schedules to assure availability of equipment, supplies, and materials at the jobsite when needed by the contractor, by the design and utilization of special devices for loading and unloading, and by submitting a firm quotation of its charges prior to entering into a contract for the performance of service. Such quotation covers all contingencies and all service contemplated. Shippers, some of whom have been using this carrier for almost 5 years, regard this total transportation price as a factor of major importance in the formulation of competitive

bids on the supplying of materials for construction projects. There is evidence that ordinary rate publication by a common carrier is inadequate. While there is no evidence of record respecting the level of rates that would be charged by Contractors Cargo in contrast to those charged by its common carrier competitors, I believe that the former's submission to shippers of firm quotations covering all of the transportation involved is a rate advantage which can be constructed to be tailored to meet the length of the shipper's purse and thus would come within the scope of *Interstate Commerce Commission v. J. J. Transport Co.*, 368 U.S. 81 (1961).

In short, I find that since Contractors Cargo has reduced the number of contracts to eight and does not exceed that number without our permission, there remains nothing for the carrier to do to bring itself in compliance with the amended definition of contract carriage.

As an alternative, however, I would allow respondent to elect to convert its operations, *on the present record*, to common carriage. I view this method as a reasonable alternative which must be considered when selecting a remedy to bring a carrier into compliance with the act. *See Gilbert-ville Trucking Co. v. United States*, 371 U.S. 115; and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156.

Finally, in order that the Commission is not frequently presented with similar situations in the future, we should consider instituting a rulemaking proceeding, with all holders of unrestricted contract carrier authority as parties, to determine the feasibility of requiring those carriers to obtain our permission if they intend to exceed the limit of eight effective contracts.

COMMISSIONER STAFFORD, dissenting in part:

I would find that applicant's existing and proposed operations meet the definition of contract carriage except for the excessive number of shippers served by the carrier.

	Nature of traffic moving requiring special type of unit	State where traffic has been shipped	Carrier used	Frequency of traffic during year preceding hearing	Amount of traffic would tender to applicant
[illegible]	Shipping requires no permit. Forty foot flat bed equipment used. Cranes require permit 4 40-foot trailers per crane.	Arizona, Nevada, Oregon, Washington.	(a) Applicant to Baker, Oreg., Phoenix, Tempe and Yuma. (b) Navajo to points in Arizona.	(a) Regular shipments of shoring to Arizona. (b) One crane to Baker.	No stated percentage, but applicant would receive some additional traffic if price is right.
[illegible]	Solo sliver doors for Titan II project, require permit. Other commodities not.	Arizona ------	Applicant ------	Six hundred forty tons to Arizona missile sites by applicant.	If price is right would use anyone for single-line service.
III. American Pipe and Construction Co., South Gate, Calif.; manufactures concrete pipe 12-inch diameter to 162-inch diameter.	No special permit required. Jobsite deliveries require pipeline stringing.	Arizona, Nevada, New Mexico, and Oregon.	(a) Belyea; ICX, Shippers Express, LASME, Consolidated Freightway, Navajo, Watson Bros., Rimsby, and Texas and Arizona, and (b) private carriage.	(a) Regular service provided by common carriers for interplant traffic to Portland, Phoenix, and Albuquerque. (b) All jobsite deliveries have been performed private carriage.	If rates are acceptable would enter into contract for specific movement.

75a

Name of shipper, type of commodities manufactured or services provided, and origin point of traffic	Nature of traffic whether requires special road permit	State where traffic has been shipped	Carrier used	Frequency of traffic during year preceding hearing	Amount of traffic would tender to applicant
IV. Cal Metal Corporation Torrence, Calif., manufacturer iron and steel pipe, 6-inch to 144-inch.	No special permit required. Jobsite deliveries require pipeline stringing.	Arizona, Nevada, New Mexico, and Oregon.	(a) Rail carriers to points in Oregon and Washington and Phoenix (b) Consolidated Copperstate, Navajo Transcon, Western Gillette, Ringsby to points in Nevada and Utah (c) Applicant to points in Arizona.	(a) Regular service by rail and common carriers (approximately 45,500 tons) (b) Regular service by applicant (approximately 4,500 tons).	If applicant's rates are acceptable on a per footage basis will continue to use whenever possible.
V. R. C. Manon & Company Torrence, Calif.; fabricates steel ovens, spray booths, and steel decking.	No special permit required.	Arizona, New Mexico.	(a) Rail whenever possible. (b) Navajo, IMC, Paxton, and Texas Arizona to points in Arizona, and New Mexico and (c) applicant to	Averages approximately six truckloads per month. Used applicant about eight times.	Would use applicant if rates are acceptable.

Name of applicant, type of transportation desired, general territory to be covered, principal points to be served, and class and kind of traffic	Nature of traffic witnesses expected to appear from protest	State where traffic has been solicited	Carriers used	Frequency of traffic for during year preceding hearing	Amount of traffic would tender to applicant
(1) Augustus Steel Corp., Los Angeles, Cal., for authority to operate as a contract carrier, over irregular routes, between points in Arizona, and between points in Arizona, on the one hand, and points in California, on the other hand,	Two special permit holders. Five shippers who requested the application. An assistant traffic manager.	Arizona, California, New Mexico, Oregon, and Washington.	(a) Arthur, Pacific Motor Trucking Co., Payne, and Savage. (b) applicant and [illegible]	Majority of traffic is in rail.	If applicant has authority and the cost of transportation is not excessive.
(2) Glenn E. Robertson, Inc., Columbus, Ohio, for authority to operate as a contract carrier over irregular routes, between points in Ohio, on the one hand, and, on the other, points in Kentucky, Indiana, and Illinois.	Two shippers.	Arizona, Oregon, and Nevada.	(a) Robertson, Motor Freight, Inc., and Pacific Coast Co. (b) applicant	Regular service by applicant and substantial numbers of carriers to Arizona and Nevada.	Will use carrier whose rates are lowest.
(3) Hall-Frank, Inc., Pocatello, Idaho, for authority to operate as a contract carrier over irregular routes, between points in Idaho, on the one hand, and, on the other, points in Utah, Nevada, Wyoming, Montana, Oregon, Washington, and California.	Two shippers. Five shippers who requested the application.	Arizona, Nevada, and New Mexico.	(a) Arthur, Pacific Motor Trucking Co., and [illegible] (b) applicant	a. Regular service by applicant to Arizona and Nevada.	Will use carrier whose rates are lowest.
(4) Consolidated Freightways, Inc., Portland, Oregon, for authority to operate as a contract carrier over irregular routes, between points in Oregon, Washington, Idaho, Montana, Wyoming, Utah, Nevada, California, Arizona, New Mexico, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Minnesota, Iowa, Missouri, Arkansas, Louisiana, Wisconsin, Illinois, Michigan, Indiana, Ohio, Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, West Virginia, Pennsylvania, New York, Maryland, Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine,	Two shippers. Five shippers who requested the application.	Oregon, Washington, Nevada, and California.	(a) Pacific Motor Trucking Co., Consolidated Freightways, Inc., and Western Express, Inc.	a. Regular service by applicant to Arizona and Nevada. b. Regular service by applicant to Arizona and Nevada. c. Regular service by applicant to Arizona and Nevada. d. Regular service by applicant to Arizona and Nevada. (b) [illegible]	[illegible]

Name of shipper, type of commodities manufactured or services provided, and origin point of traffic	Nature of traffic (whether requires special road permit)	State where traffic has been shipped	Carrier used	Frequency of traffic during past preceding 12 months	Amount of traffic would tender to applicant
X. Southwest Welding & Mfg. Co., Alhambra, Cal.; fabricate road construction equipment, steel tanks, and steel weldments.	15 to 20 percent of traffic tendered requires permit.	Arizona, Nevada, and New Mexico.	Bolyen, Paxton; ICX, Navajo and Texas-Arizona.	(a) general commodity carriers and used regularly for light shipment to Arizona and New Mexico.	Would use applicant if rates are acceptable.
XI. Western Bridge & Associates, Paramount, Calif.; steel fabrication and structural steel erections.	Requires special permit.	None, but has 30 tons of structural steel to move about 9/63.	None	None	Would use applicant if price is not too high.

APPENDIX B

Summary of protesting carriers' ability to perform the service proposed and extent of service performed for shippers supporting the authority sought

Name of protesting carrier	Type of carrier	Ability to originate traffic for supporting shippers	Authority held which conflicts with authority held or sought by applicant	Evidence adduced of service performed for supporting shippers within year preceding hearing	Evidence adduced of interline or interchange agreements	Predominant nature of traffic
(A)	(B)	(C)	(D)	(E)	(F)	(G)
Albuquerque-Phoenix Express.	Common carrier regular-route.	No	General commodities, with exceptions, between points in Arizona and New Mexico.	None	California and Texas.	Dry freight
Ray E. Cagle and Forrest L. Cagle.	Common carrier irregular route.	Yes	Iron and steel products, machinery, and pipe, which require use of special equipment between points in Arizona, on the one hand, and, on the other California, Nevada and New Mexico.	do	California	Heavy hauling
Western Gillette Inc.	Common carrier regular route.	do	General commodities, with exceptions, but including machinery and mining equipment between points in California, and (a) Arizona, (b) Nevada, and (c) points in New Mexico.	Southwestern Engineering Co. and Cal-Metal.	All States under consideration.	Dry freight
Paxton Trucking Company.	Common carrier irregular route.	do	Heavy and cumbersome commodities between all points in California.	Allied Engineering and Smith-Scott more than 1 year preceding hearings.	Nevada	Heavy hauling

Summary of protesting carriers' ability to perform the service proposed and extent of service performed for shippers supporting the authority sought—Continued

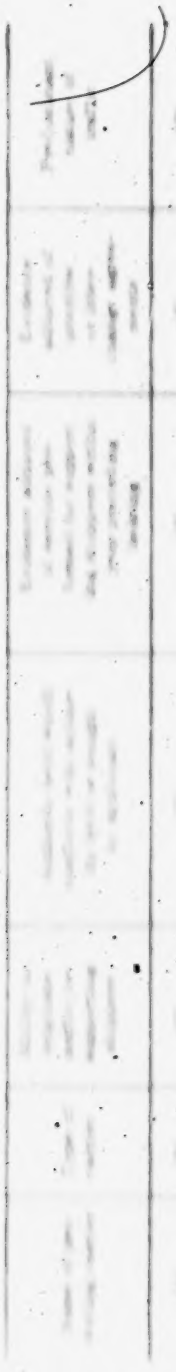
Name of protesting carrier	Type of carrier	Ability to originate traffic for supporting shippers	Authority held which conflicts with authority held or sought by applicant	Evidence adduced of service performed for supporting shippers within year preceding hearing	Evidence adduced of interline or interchange agreements	Predominant nature of traffic
(A)	(B)	(C)	(D)	(E)	(F)	(G)
Dealers Transit, Incorporated, predecessor Belgea Truck Company.	Common carrier irregular route.	Yes	Heavy and cumbersome commodities between points in California, Nevada, Arizona, and New Mexico.	American Pipe and Construction Co., Republic Steel Corp., Harry E. Robertson, Inc., Southwestern Engineering Co. and Southwestern Welding and Manufacturing Co.	Oregon and Washington.	Heavy hauling.
J. H. Rose Truck Lines, Inc.	do	do	Commodities which because of size or weight require special equipment between points in California on the one hand, and, on the other, points in Arizona, Nevada, and New Mexico.	None	do	do
Consolidated Freightways Corp. of Delaware.	Common carrier Regular route.	do	General commodities, with exceptions, over regular routes, between points in Arizona, California, Nevada, and Washington, and construction materials, machinery, equipment and supplies, over irregular routes, between points in California and points in Oregon and Washington.	do	New Mexico	Dry freight.

Summary of protesting carriers' ability to perform the service proposed and extent of service performed for shippers supporting the authority sought—Continued

Name of participating carrier	Type of carrier	Ability to originate traffic for supporting shippers	Authority held which conflicts with authority held or sought by applicant	Evidence adduced of service performed for supporting shippers within year preceding hearing	Evidence adduced of interline or interchange agreements	Predominant nature of traffic
(A)	(B)	(C)	(D)	(E)	(F)	(G)

Summary of proceedings (persons actually in attendance, the persons prepared and actions of persons performed for purposes of satisfying the authority's obligations)

Name of proceeding (person)	Type of proceeding	Ability to engage and/or for expediting purposes	Authority not to attend conference or not to attend (to be) or brought (to be)	Evidence adduced of exercise performed for purposes of engaging in within prior period and hearing	Evidence adduced of direction or interchange agreements	Predominant nature of traffic
(A)	(B)	(C)	(D)	(E)	(F)	(G)



(A)	(B)	(C)	(D)	(E)	(F)	(G)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at it office in Washington, D. C., on the 1st day of September 1967

No. MC 17745 (Sub-No. 51)

CONTRACTORS' CARGO COMPANY

EXTENSION OF OPERATIONS

No. MC C-3607

ASBURY TRANSPORTATION COMPANY, ET AL.

v.

CONTRACTORS CARGO COMPANY

No. MC C-3628

CONTRACTORS CARGO COMPANY, INVESTIGATION AND REVOCATION OF PERMIT

It appearing, That on October 22, 1964, the Commission, division 1, made and filed its report, 96 M.C.C. 396, and order in Nos. MC 17745 (Sub-No. 51), MC C-3607, and MC C-3628, finding (a) in No. MC 17745 (Sub-No. 51) that the operations proposed by Contractors Cargo Company were those of a common, rather than contract carrier by motor vehicle, that it was not fit to perform the service proposed, and that the application should be denied; and (b) in Nos. MC C-3607 and MC C-3628 that Contractors Cargo Company had exceeded the territorial scope of its permit and has operated unlawfully as a common carrier by motor vehicle rather than as a contract carrier as authorized by its permit and ordered it to cease and desist and the latter refrain from certain activities found thereon to be unlawful;

It further appearing, That upon consideration of the record in the above-entitled proceedings, these proceedings were on our own motion reopened for reconsideration by order of May 3, 1965;

And it further appearing, That reconsideration of the matters and things involved has been given and that the

Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the said report of October 22, 1964, are hereby referred to and made a part hereof:

It is ordered, That the said order of October 22, 1964, be and it is hereby, vacated and set aside.

It is further ordered, That the application in No. MC 17743 (Sub No. 5), be, and it is hereby, denied.

It is further ordered, That in Nos. MC C-3807 and MC C-3628, Contractors Cargo Company, a corporation, of Los Angeles, Calif., be, and it is hereby, notified and required to cease and desist, and thereafter to refrain and abstain from exceeding the territorial scope of its permit in the manner found to be unlawful in the findings respecting each of these proceedings in said report.

It is further ordered, That in Nos. MC C-3807 and MC C-3628 that the statutory effective and compliance date of this order, insofar as it pertains to the unlawful operations of Contractors Cargo Company in exceeding the territorial scope of its permit, be, and it is hereby, fixed as November 16, 1967.

And it is further ordered, That in all other respects the proceedings in Nos. MC C-3807 and MC C-3628 be, and they are hereby, held open for a period of 90 days from the date of service of this order, or for such additional time as may be authorized by the Commission, in order that Contractors Cargo Company may elect, through the filing of an appropriate verified statement, a method of bringing its operations into conformity with the Interstate Commerce Act and our rules and regulations thereunder, as described in the said report.

By the Commission.

H. Neil Garson
Secretary

(SEAL)

APPENDIX I

28 U.S.C. Secs. 1338, 1398, 2284, and 2321-2325

ment or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State

court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States. June 25, 1948, c. 646, 62 Stat. 969; May 24, 1949, c. 139, § 115, 63 Stat. 103.

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States. June 25, 1948, c. 646, 62 Stat. 969.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. June 25, 1948, c. 646, 62 Stat. 970; May 24, 1949, c. 139, § 116, 63 Stat. 105.

§ 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action. June 25, 1948, c. 646, 62 Stat. 970.

§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970.

APPENDIX G

28 U.S.C., Sec. 1253

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1969

CONTRACTORS CARGO COMPANY, *Appellant,*

v.

UNITED STATES, ET AL.

Order

UPON CONSIDERATION of the application of counsel for the appellant, and of the briefs in opposition of the appellees thereto,

IT IS ORDERED that the cease and desist order of the Interstate Commerce Commission of September 1, 1967, be, and the same is hereby, stayed pending the perfection and disposition of an appeal to this Court.

/s/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of September, 1969.

SUPREME COURT, U. S.

DEC 31 1969

DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 912

CONTRACTORS CARGO COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEALERS TRANSIT, INC., PROGRESSIVE TRANSPORTATION CO., and J. H. ROSE TRUCK LINE, INC.,
Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

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IN THE

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Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Pursuant to Rule 16.1(c) of the Rules of this Court, intervening defendants, Dealers Transit, Inc., Progressive Transportation Co., and J. H. Rose Truck Line, Inc., Appellees herein, (hereinafter respectively called Dealers Transit, Progressive, and J. H. Rose, or Appellees), move to affirm the judgment of The United States District Court, Central District of California[1] a Statutory Court of three Judges,[2] affirming the De-

[1]Not yet reported but copy attached to Appellant's Jurisdictional Statement as Appendix "A".

[2]In action under 28 U.S.C. 1336, 1398, 2284, and 2321-2325.

cision of the Interstate Commerce Commission,[3] and as grounds for such motion say: THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Statement of the Case.

Appellant is a California corporation, with its principal office located in the Central District of California and conducts business as a contract motor carrier under a permit issued by the Interstate Commerce Commission. As pertinent here, Appellant's permit authorizes motor contract carriage over irregular routes of construction materials and contractor's machinery, supplies and equipment, as follows:

(1) Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada within a hundred miles of such railheads; or

(2) Between such construction projects or points in use and the nearest railhead, when none is located within a hundred miles thereof.

Their permit was issued initially to Ellsworth Pexton in Docket No. MC-17745 (Sub-No. 1), 13 M.C.C. 369 (January 6, 1939). Pexton transferred the permit to Constructors Transport Co., and the latter transferred it to William A. Hufnagel, doing business as Contractors Cargo Company. Appellant corporation acquired the permit by assignment from Hufnagel. By

[3]Reported at 105 M.C.C. 683.

various transfers of corporate stock in 1962 and 1963, Clark & Wheeler Engineering Co., Inc., acquired all stock of Appellant corporation.

By application filed March 2, 1962, Appellant sought clarification of its permits and, in the alternative, in case the Commission did not accept Appellant's interpretation of its permits, an extension of its authority to operate as a contract carrier by motor vehicle, over irregular routes, of construction materials and contractor's machinery, supplies, and equipment between points within a radius of one hundred miles of all railheads in the six states and construction projects or other points of use within a radius of one hundred miles of all such railheads. Subsequently, a number of motor carriers filed a complaint with the Commission charging that Appellant had been exceeding the scope of its authority. The Commission also instituted an investigation on its own initiative of Appellant's operations. The three proceedings were referred to an Examiner to be heard on a common record.

Appellant contended before the Commission that the authority in Paragraph (1) is non-radial as established by the absence of certain words commonly found in radial types of authority, namely, the words "between . . . on the one hand, and, on the other. . . ."

The Commission, Division 1, found that it was unable to determine from the permit whether radial or non-radial operations were authorized in the first paragraph as set forth above, that the language of the permit was contradictory and unclear, that Appellant's permit was patently indefinite and ambiguous, and that the record in the proceeding underlying applicant's permit (*Perton*

Extension of Operations—Coast States, 13 M.C.C. 369) had to be examined in order to aid in its interpretation. The Commission, Division 1, concluded, in 96 M.C.C. at page 312:

> "It is clear, therefore, that both the first and second paragraphs of the pertinent parts of applicant's permit contemplate radial operations between railheads, on the one hand, and, on the other, construction projects or other points of use; that the 100-mile radius in the first paragraph must be drawn from the 'railhead' actually used by applicant in serving a particular construction project or point of use; and that no service is authorized in the second paragraph to or from railheads or other points of use outside the six states named in the first paragraph."

The Decision of the Division was affirmed by the full Commission (105 M.C.C. 683), and the Commission issued a Cease and Desist Order on September 1, 1967, effective November 16, 1967, barring Appellant "from exceeding the territorial scope of its permit".

The United States District Court, on November 14, 1967, issued a temporary restraining Order preventing the Commission from enforcing its Order. In the District Court Appellant sought a review only of the Commission's determination of the territorial scope of Paragraph (1) of its permit as being radial rather than non-radial, and that the Cease and Desist Order be vacated. Appellant did not challenge the fact that if the Commission properly looked at antecedent material then its interpretation of the permit was correct. Appellant's contention was that the Commission failed to apply proper principles governing the interpretation of

the permit, erred in finding that the permit was patently ambiguous, ignored the rules applicable to the delineation of radial and non-radial operating authority, erred in referring to extraneous matters for the purpose of construing the permits, and failed to consider the Appellant's status as an innocent purchaser.

The lower Court found that the certificate was ambiguous, and the Commission properly resorted to the record to aid in its construction. The Court further found that the Commission's Order was within its statutory authority, was reasonable, and was based on adequate findings supported by substantial evidence in the record. The Court refused to give special consideration to a good faith purchaser where the language of the permit presented such a glaring error or inconsistency that such purchaser should be placed on guard. The temporary restraining Order therefore was vacated, and judgment was granted for the defendants.

Parenthetically, Appellee notes that in Appellant's statement of the case it comments:

> "Based on service conducted and held out by its immediate predecessor and on its own understanding of the language, Appellant thereafter regarded its permits as non-radial authority to operate between any two railheads. . . ."

Appellant's statement that its reliance was "based on service conducted . . . by its immediate predecessor", is contrary to the evidence submitted at the hearing. At the time of purchase, the record reveals that Appellant's predecessor was almost defunct as a carrier, having but one effective contract, and owning no equipment. (105 M.C.C. 694, Tr. 148, 149).

AUTHORITIES AND ARGUMENT.

Appellant presents three questions which Appellant says are so substantial as to require "plenary consideration by this Court." The fact is, however, that this case poses no new or unusual issue of law. The basic question is whether the Commission's findings concerning the ambiguity of the language involved in Appellant's permit is rational and as a consequence its construction of the permit is supportable. Intertwined with this question is whether the Commission is required to use the words "between . . . on the one hand, and on the other . . ." in effectively establishing radial authority.

All parties and the Court below agreed that the threshold question is whether the certificate is indeed ambiguous on its face. Certainly, the certificate speaks for itself, unless it be patently indefinite or ambiguous. Absent such ambiguity, extraneous matters may not be referred to in order to interpret the permit, particularly when it is held by an innocent purchaser. *McCormick Trucking Company v. United States*, 251 Fed. Supp. 526 (D.N.J. 1966). The Commission, Division 1, acknowledged this requirement and stated (96 M.C.C. 311):

> ". . . after carefully reviewing the pertinent parts of applicant's permits, we are unable to conclude whether radial or non-radial operations were authorized in the . . . paragraph quoted above, and in other respects we find the language employed in the above-quoted passages to be contradictory and

unclear. Consequently, we conclude that applicant's permit is patently indefinite and ambiguous and that the record in the proceedings underlying applicant's permit must be examined in order to aid in its interpretation."

The Court below agreed that the permit was patently ambiguous and stated:

> "Plaintiff interprets the second paragraph of its permit to authorize non-radial operations between any two railheads in the six states, between any two construction projects or other points of use in those states within 100-miles of any railhead in the six states, and between a railhead in any of the named states and a construction project or other point of use in the states within 100-miles of a railhead, or, where there is no railhead within 100-miles of a particular construction project or point of use, between the project or point of use and the nearest railhead.
>
> "The permit likewise may be construed, without violence to the language, as allowing radial service between railhead and construction project or other point of use within the circumscribed area.
>
> "The Court finds that the certificate is ambiguous, and the Commission properly resorted to the record to aid in its construction."

Appellant itself has adopted conflicting interpretations of its certificate. Appellant's position before the lower Court concerning delineation of the territorial scope of its permit was at variance with its prior positions be-

fore the Commission. In its brief to the lower Court, Appellant stated (Brief p. 27):

> "Lastly, the only operations which can be performed under the permit in question *are within the six-named states, and plaintiff does not urge otherwise.*" (Emphasis supplied).

In its brief to the Examiner, however, Appellant did urge otherwise. Appellant stated (Brief to Examiner, p. 33):

> "The permit further provides that when no railhead is located within 100-miles of a construction project, or a point of use in any one of the six named states the transportation may be between such construction projects or other points of use and *the nearest railhead regardless of whether other such railhead is in one of the named states or another state.*" (Emphasis supplied).

This interpretation was also urged by Appellant in its Exceptions to the Examiner's Report (p. 84): and is specifically referred to by the Commission at 96 M.C.C. 309.

In Appellant's own words, therefore, the permit admits of two distinct interpretations—merely to points within the six named states, on the one hand, or, on the other, encompassing additional states.

As the Commission Examiner aptly commented at the hearing ". . . as I have heard the testimony we now have three separate interpretations (Tr. 172)." All were by Appellant. It is submitted that Commission's and the lower Court's determination that the permit is ambiguous is not clearly erroneous—the legal standard upon which review is based—if for no other reason than

the Appellant itself and its counsel have advanced inconsistent interpretations as to the meaning of its own permit and admit that different interpretations are possible.

If the certificate is found to be patently ambiguous, Appellant did not challenge the fact that if the Commission properly looked at antecedent record, then its interpretation of the permit is correct.

Appellant next contends that the words "on the one hand" and "on the other hand" delineating radial type services which must begin or end at a base point or area, have been "exclusive and, from the standpoint of constructing radial authority, their use has been mandatory". While it is true that the Commission has used such language in its authorities to indicate a radial type grant, the Commission has never indicated that it is mandatory that radial authorities have such language. It is apparent that the language here has the same connotation and should be accorded the same effect without such language. As to the words of extremity, the lower Court stated:

> "No case has been cited, either to this Court or in the course of the Commission proceedings, wherein radial authority has been granted without use of the words above quoted. Neither does it appear that the phrases are touched on by whose presence or absence the permit must be construed."

Appellees contend that the real issue in this case is that the permit, when read as a whole, with its redundancy and dependent last clause, does not, in plain english, authorize an unlimited service between railheads. Unlike most interpretation cases where the

plain English meaning tends to support an Appellant's position, here, the plain meaning of the permit as a whole negates Appellant's interpretation.

Finally, Appellant asserts that it should receive a special position as a "good faith purchaser". In light of the operations of the corporation when Appellant assumed control, and the obvious ambiguity on its face recognized by Appellant as noted above, Appellees submit that the lower Court assumed the proper position when it stated:

> "A good faith purchaser does not merit special consideration where the language of the permit presents such a glaring error or inconsistency that he should be put on guard. *McCormick Trucking Company vs. United States, Supra.*"

Appellees, Dealers Transit, Progressive, and J. H. Rose respectfully submit that the judgment of the District Court should be affirmed, and so pray.

Respectfully submitted,

KNAPP, GILL, HIBBERT & STEVENS,
WYMAN C. KNAPP,
Attorneys for Appellees.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 912

CONTRACTORS CARGO CO., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a decision (299 F. Supp. 287; J.S. 1a–13a) and final judgment (J.S. 14a) of a three-judge district court dismissing a complaint brought to set aside a Commission order requiring appellant to cease and desist from conducting operations found to be unauthorized by its operating authority. (96 M.C.C. 306, J.S. 15a–37a; affirmed on reconsideration, 105 M.C.C. 683, J.S. 37a–88a).

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Appellant, a motor vehicle contract carrier, initiated a Commission proceeding in 1962 for a determination of the territorial scope of its permit and, if necessary, for additional operating rights. Subsequently, competing carriers filed a complaint charging, among other things, that appellant had operated beyond the scope of its permit, and the Commission also instituted its own investigation. All three proceedings were consolidated for hearing and determination (J.S. 15a–16a).

The issue common to each proceeding, and the sole issue involved in this appeal, is the territorial scope of appellant's permit. That permit (J.S. 38a–39a) authorizes appellant to transport:

> *Construction materials and contractor's machinery, supplies and equipment,* * * *.
> Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.

Appellant contended that its permit is clear on its face, and confers "non-radial" authority; that is, it permits operations anywhere within the designated area without reference to the base points. (J.S. 18a–19a). After full administrative proceedings, the Commission found that the "permit is patently indefinite

and ambiguous and that the record in the proceedings underlying [appellant's] permit must be examined in order to aid in its interpretation" (J.S. 22a).[1] Upon such examination, the Commission concluded that the permit confers only "radial" authority authorizing service from or to a particular base point, *i.e.*, movements from a railhead to a construction site or other point of use within 100 miles of the railhead, or return (J.S. 23a).[2] Accordingly, the Commission issued a cease and desist order (J.S. 36a) requiring appellant to conform its operations to this reading of the permit.

The three-judge district court unanimously sustained the Commission's decision. It ruled that the permit "is ambiguous, and the Commission properly resorted to the record to aid in its construction"; and that "the Commission's order is within its statutory authority, is reasonable, and is based on adequate findings supported by substantial evidence in the record" (J.S. 6a).[3]

[1] The permit was originally issued to Ellsworth Pexton, who transferred it to Constructors Transport Co., which transferred it to William A. Hufnagel, d/b/a Contractors Cargo Co. Appellant corporation acquired the permit by assignment from Hufnagel (J.S. 2a).

[2] The Commission's conclusion that the record in the application proceeding in which the authority was granted shows that only "radial" operations were contemplated was not challenged in the district court (J.S. 11a) and is not challenged here.

[3] Appellant's request for a stay of judgment pending appeal and its petition for reconsideration were denied by the court below. On September 12, 1969, Mr. Justice Douglas issued a stay of the Commission's cease and desist order pending disposition of this appeal (J.S. 94a).

ARGUMENT

The question presented by this appeal—whether appellant's permit is ambiguous—is insubstantial. The district court correctly held that the permit was sufficiently ambiguous to justify the Commission's considering the evidence underlying its issuance. As the court noted (J.S. 5a), the interpretation of a certificate or permit issued by the Commission is primarily a question for that agency. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171. Unless the Commission's interpretation is clearly erroneous, it is binding on the courts. *Nelson, Inc. v. United States*, 355 U.S. 554.

Contrary to appellant's contention (J.S. 9 *et seq.*), the Commission did not look to the underlying record to determine that the permit was ambiguous; rather it found in the first instance that the language itself was "patently indefinite and ambiguous" (J.S. 22a). Only then was resort had to the underlying record to resolve the ambiguity. The district court agreed; it ruled that the absence of certain limiting words ordinarily found in grants of radial authority is not conclusive where the permit is otherwise ambiguous (J.S. 6a), and found that the permit could be construed as authorizing either non-radial or radial operations "without violence to [its] language" (*Ibid.*).

T. I. McCormick Trucking Co. v. United States, 298 F. Supp. 39 (D.N.J.), relied on by appellant, is inapposite. There, in remanding the proceedings for a second time, a divided court decided that the Commis-

sion had erred in relying on its expertise to find a certificate clear on its face after having previously found the certificate ambiguous on its face. The majority of the district court stated that deference to the Commission's expertise in construing non-technical territorial descriptions, as opposed to commodity descriptions, is not required where the construction turns on a rule of grammar (298 F. Supp. at 41). Here there has been no such vacillation, and the language of the certificate is, if anything, more consistent with radial authority than with non-radial.

Finally, there is no merit to appellants' contention (J.S. 13) that the district court erred in determining that the appellant was not entitled to rely as a "good faith purchaser" on its original interpretation of the permit. The court properly ruled that appellant should not be accorded special consideration here, "where the language of the permit presents such a glaring error or inconsistency that [a good faith purchaser] should be put on guard" (J.S. 7a; and see J.S. 25a–28a, 53a–58a).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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RICHARD W. MCLAREN,
Assistant Attorney General.
GREGORY B. HOVENDON,
GEORGE EDELSTEIN,
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JANUARY 1970.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 912

CONTRACTORS CARGO CO., *Appellant*,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
DEALERS TRANSIT, INC.,
PROGRESSIVE TRANSPORTATION CO.,

and

J.H. ROSE TRUCK LINE, INC., *Appellees*.

Appeal From the United States District Court for the Central District of California

RESPONSE TO MOTIONS TO AFFIRM

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Dated: January 15, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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CONTRACTORS CARGO CO., *Appellant*,

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Appeal From the United States District Court for the Central District of California

RESPONSE TO MOTIONS TO AFFIRM

Appellees deny that substantial questions are presented in appellant's Jurisdictional Statement and in separate motions urge affirmance of the judgment below. It is not immoderate to state that the respective motions to affirm are largely non-responsive. They do not pretend to help guide the court through the inter-

pretative thicket by dealing directly with the core issue of how the agency arrived at its ambiguity determination.

There is more than a shade of naivete about the Commission's analysis of its own action. This appellee dogmatically states (Motion, p. 4) that resort was had to the underlying record only after a finding of ambiguity. Yet it stands mute on the fact that the prior record was admitted (J.S. 5) and that specific inquiry was made by that agency into the intent at the time of issuance (J.S. 6 et seq) before considering its usual rule of construction. Presumably, the Commission would have the court believe that the words "intended" and "contemplated", as used by the agency in interpreting appellant's permit, are not to be understood in their normal sense. Further, the agency offers no reason for not giving effect to its own long recognized rules of construction nor does it refute that the application of a new test in this case will become endemic to all holders of traditionally non-radial rights.

By any standard, save sheer administrative fiat, the ambiguity determination in this instance went beyond the permissible limits of inquiry. While the Commission enunciated (J.S. 6) the cardinal rule that the permit must be construed according to its terms, regardless of the initial intent, it ignored such principle with the acquiescence of the court below. The issue raised here is insubstantial only if the agency has been perpetuating a myth when it says that the original intent behind a grant is inconsequential. In that event, contrary to *McCormack Trucking Co. v. United States*, 251 F. Supp. 526, 538 (1966) a holder actually may not rely upon the terms of the authority

without consulting the original grantee or perusing voluminous records.

The Commission does not lay claim to any administrative expertise in construing this non-technical territorial description, in the light of the second *McCormack* case. Instead, it makes an abortive effort to distinguish that decision. It asserts that such case is inapposite because there was no agency vacillation here and the language of the (sic) certificate is, if anything, more consistent with radial authority than with non-radial (Motion, p. 5). The novelty of reading the missing words of extremity into the language of the permit supplies the vacillation of which the agency speaks. If the Commission made a mistake in wording the original grant, it did nothing to correct such mistake in the course of approving the successive transfers. An agency becomes deaf to the demands of fairness when it voices the basic rules of interpretation and then proceeds to ignore them.

Appellee-carriers seek to justify the ambiguity findings on grounds that appellant originally interpreted its permit as allowing service, in some instances, outside of the six-state area and that different interpretations were advanced at the hearing (Motion p. 8). The sole issue here is whether the permit confers radial or non-radial territorial authority. Such inquiry involves no question of whether appellant may operate beyond the six-state area. Furthermore, the agency did not rely upon such testimony in arriving at its findings of ambiguity. Appellee-carriers are free to abandon any pretense of supporting the decision upon the ground stated by the agency but such considerations have no relevance here. Appellee-carriers further undercut their own position by the

somewhat anomalous assertions that appellant's interpretation is supported by neither the *plain meaning* of its permit nor the antecedent record. (Motion, p. 9 et seq) If the language has a plain meaning, any resort to the prior record was idle and prejudicial and it would be immaterial whether appellant agreed or disagreed with the agency's current interpretation of that record. Further, if appellee-carriers are correct in stating (Motion, p. 9) that the use of the words of extremity is not mandatory in delineating radial grants and that the permit has the same connotation without such language, why then did the agency itself (J. S. 7) retroactively graft that very language upon the permit?

While mere differences of opinion do not constitute a legal basis for an ambiguity finding, appellant's understanding of the meaning of its own permit does have relevance to its innocent purchaser status. We fail to follow appellee-carriers' reasoning in suggesting a connection between the alleged scope of operations of appellant's immediate predecessor and the *glaring error or inconsistency finding* that was volunteered by the lower court. The only legal opinion which appellant had as to the territorial scope of its permit up to the time that its present management acquired control of such company corresponded with the interpretation advanced here. The evidence of record establishes that appellant's predecessor held himself out to provide service consistent with that interpretation and had rates on file covering such service (TR 172, 212 et seq, 219-220). It was not until after appellant's present management acquired control of the company that any questions were raised concerning the operations being conducted by appellant

(TR 217-218). In the premises, appellant is entitled to fuller protection than a participant in the original proceeding and the court below was not justified in advancing its own independent findings, which are now adroitly adopted by appellees.

The questions presented are substantial and deserve the plenary consideration of the court.

Respectfully submitted,

CONTRACTORS CARGO CO.

By _____
WILLIAM P. SULLIVAN
Attorney for Appellant

Of Counsel:

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CERTIFICATE OF SERVICE

I, William P. Sullivan, attorney for appellant Contractors Cargo Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 15th day of January, 1970, I have served copies of this Response To Motions To Affirm on attorneys of record of each of the parties hereto as follows:

By first class mail, in duly addressed envelopes, with first class postage prepaid, to the following:

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WILLIAM P. SULLIVAN

SUPREME COURT OF THE UNITED STATES

October Term, 1968

CONTRACTORS CARGO CO. v. UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 682. Decided February 24, 1969

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.